REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 196.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN APRIL, 1902, AND CASES IN WHICH REHEARINGS WERE DENIED AT THE JUNE TERM, 1902.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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BENJAMIN D. MAGRUDER, CHIEF JUSTICE.*

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JACOB W. WILKIN,
JOSEPH N. CARTER,
JAMES H. CARTWRIGHT,
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ALBERT D. CADWALLADER.

CLERK FOR THE NORTHERN GRAND DIVISION,
CHRISTOPHER MAMER.

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*Mr. Justice Magruder became Chief Justice at the June Term, 1902.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A

PAGE.

Albrecht *v.* Hunecke 127
Alsdurf *v.* Williams..... 244
Altamont, Village of, *v.* Carter..... 286

B

Bassford *ads.* Maginn..... 266
Bishop *v.* Thompson..... 206
Board of Trade *ads.* Central Stock and Grain Exchange 396
Bonander *ads.* Street's Western Stable Car Line..... 15
Brugger *ads.* Chicago Title and Trust Co..... 96

C

Carter *ads.* Village of Altamont..... 286
Caruthers *ads.* Henry..... 136
Central Stock and Grain Exchange *v.* Board of Trade. 396
Chicago Auditorium Ass. *v.* People *ex rel*..... 353
Chicago, City of, *v.* Chicago League Ball Club..... 54
Chicago, City of, *v.* Corcoran. 146
Chicago, City of, *ads.* Gage. 512
Chicago, City of, *v.* Holden. 153
Chicago, City of, *v.* Jackson. 496
Chicago, City of, *v.* Lonergan. 518
Chicago, City of, *ads.* Myers. 591
Chicago, City of, *ads.* Nelson. 390
Chicago, City of, *v.* O'Malley. 197

PAGE.

Chicago, City of, *v.* Norton Milling Co..... 580
Chicago, City of, *v.* Peck... 260
Chicago, City of, *ads.* South Chicago City Ry. Co..... 490
Chicago, City of, *ads.* Topliff. 215
Chicago City Ry. Co. *v.* Cooney..... 466
Chicago City Ry. Co. *v.* Tuohy. 410
Chicago and Eastern Illinois R R. Co. *v.* Huston..... 480
Chicago League Ball Club *ads.* City of Chicago..... 54
Chicago Title and Trust Co. *v.* Brugger..... 96
Chilvers *v.* Race..... 71
Clinton Electric Light, Heat and Power Co. *ads.* Snell.. 626
Coleman *ads.* Gandy..... 189
Collins *ads.* Wolf..... 281
Condit *v.* Widmayer..... 623
Consolidated Coal Co. of St. Louis *v.* Lundak..... 594
Cooney *ads.* Chicago City Ry. Co..... 466
Corcoran *ads.* City of Chicago 146
Cratty *ads.* Glos..... 193

D

Danahy *ads.* McDonald..... 133
Dandurand *v.* County of Kankakee..... 537
Davenport, Rock Island & N. W. Ry. Co. *ads.* Guyer.. 370

PAGE.
Dolton *ads.* Village of Dolton 154
Downing *ads.* Norris..... 91

E

Engelthaler *v.* Engelthaler. 230
Evans *v.* Williams..... 244

F

Farmington, City of, *ads.* Rose..... 226
Franklin Park, Village of, *ads.* People *ex rel.*..... 276

G

Gage *v.* City of Chicago 512
Gandy *v.* Coleman..... 189
Gary *ads.* People *ex rel.*..... 310
Gilbert *v.* Sprague..... 444
Glos *v.* Cratty..... 193
Granger *ads.* Matthews..... 164
Gregory *ads.* Truax..... 83
Guyer *v.* Davenport, Rock Island & N. W. Ry. Co..... 370

H

Haase *ads.* Radloff..... 365
Hadfield *ads.* Stevens..... 253
Hartford Fire Ins. Co. *ads.* Raymond..... 329
Hartford Life and Annuity Ins. Co. *v.* Rossiter..... 277
Hauk *v.* VanIngen..... 20
Hays *v.* St. Paul Methodist Episcopal Church..... 633
Henry *v.* Caruthers..... 136
Hill *v.* Spencer..... 65
Holden *ads.* City of Chicago. 153
Hunecke *ads.* Albrecht..... 127
Huston *ads.* Chicago & Eastern Illinois R. R. Co..... 480
Hutchinson *v.* Hutchinson.. 432

I

Illinois Iron and Metal Co. *v.* Weber..... 526
Illinois Steel Co. *v.* McFadden 344

J

PAGE.
Jackson *ads.* City of Chicago. 496
Jackson *ads.* Peterson..... 40
Jennings *ads.* Reed..... 472
Johnson *v.* McDonald..... 394

K

Kankakee, County of, *ads.* Dandurand..... 537
Kendall *v.* West..... 221
Kingman *v.* People *ex rel.*.... 192
Koelling *v.* People *ex rel.*.... 353
Koutnik *v.* Koutnik..... 162

L

Lehigh *ads.* World's Columbian Exposition..... 612
Lehr *ads.* People..... 361
Lonergan *ads.* City of Chicago..... 518
Lundak *ads.* Consolidated Coal Co. of St. Louis.. ... 594

M

Maginn *v.* Bassford..... 266
Maginnis *ads.* Starkweather. 274
Mahon *v.* Mooney.. 147
Mann *ads.* O'Flaherty..... 304
Matson *v.* Ripley..... 269
Matthews *v.* Granger..... 164
McCormick Harvesting Machine Co. *ads.* Peck..... 295
McDonald *v.* Danahy..... 133
McDonald *ads.* Johnson..... 394
McDonald *ads.* South Chicago City Ry. Co..... 203
McFadden *ads.* Illinois Steel Co..... 344
McLean County Coal Co. *v.* Simpson..... 258
McSorley *v.* Schroeder..... 99
Mensch *ads.* Ogden Building and Loan Ass..... 554
Mikkelsen *ads.* Simpson..... 575
Mooney *ads.* Mahon..... 147
Morey *ads.* Sunasack..... 569
Morrison *v.* People..... 454
Murphy *ads.* O'Hara..... 599

PAGE.
Muscial *ads.* Western Stone Co..... 382
Myers *v.* City of Chicago.... 591

N

Nelson *v.* City of Chicago... 390
Norris *v.* Downing 91
Norton Milling Co. *ads.* City of Chicago..... 580

O

O'Brien *ads.* People *ex rel.*.. 250
O'Flaherty *v.* Mann..... 304
Ogden Building and Loan Ass. *v.* Mensch..... 554
O'Hara *v.* Murphy 599
Olmstead *v.* Vance & Jones Co 236
Olney Loan and Building Ass. *v.* Parker..... 388
O'Malley *ads.* City of Chicago 197
Otis *v.* People *ex rel.*..... 542

P

Parker *ads.* Olney Loan and Building Ass..... 388
Peck *ads.* City of Chicago.. 260
Peck *v.* McCormick Harvesting Machine Co..... 295
People *ex rel. ads.* Chicago Auditorium Ass..... 353
People *ex rel. v.* Gary 310
People *ex rel. ads.* Kingman. 192
People *ex rel. ads.* Koelling.. 353
People *v.* Lehr..... 361
People *ads.* Morrison..... 454
People *ex rel. v.* O'Brien 250
People *ex rel. ads.* Otis..... 542
People *ads.* Schroeder..... 211
People *ex rel. ads.* Title Guarantee and Trust Co..... 353
People *ex rel. v.* Village of Franklin Park..... 276
People *ex rel. ads.* Wabash R. R. Co..... 606
People *ads.* Williams..... 173
People *ex rel. ads.* Young ... 603
Peterson *v.* Jackson..... 40
Petters *ads.* West Chicago Street R. R. Co..... 298

R

Race *ads.* Chilvers..... 71
Radloff *v.* Haase..... 365
Ramsay *v.* Ramsay 179
Raymond *v.* Hartford Fire Ins. Co..... 329
Reed *v.* Jennings..... 472
Ripley *ads.* Matson..... 269
Rogers *ads.* Wells 292
Rose *v.* City of Farmington. 226
Rossiter *ads.* Hartford Life and Annuity Ins. Co..... 277
Rowatt *ads.* Spring Valley Coal Co..... 156

S

Schmidt *v.* Shaver..... 108
Schroeder *ads.* McSorley ... 99
Schroeder *v.* People..... 211
Shaver *ads.* Schmidt..... 108
Simpson *ads.* McLean County Coal Co..... 258
Simpson *v.* Mikkelsen..... 575
Snell *v.* Clinton Elect. Light, Heat and Power Co..... 626
South Chicago City Ry. Co. *v.* City of Chicago..... 490
South Chicago City Ry. Co. *v.* McDonald 203
Spencer *ads.* Hill..... 65
Spencer *v.* Spruell..... 119
Sprague *ads.* Gilbert..... 444
Spring Valley Coal Co. *v.* Rowatt 156
Spruell *ads.* Spencer..... 119
Stafford *ads.* City of Taylorville 288
Starkweather *v.* Maginnis... 274
Stevens *v.* Hadfield..... 253
St. Paul Methodist Episcopal Church *ads.* Hays..... 633

PAGE.
Street's Western Stable Car Line *v.* Bonander..... 15
Sunasack *v.* Morey..... 569

T

Taylorville, City of, *v.* Stafford..... 288
Thompson *ads.* Bishop..... 206
Title Guarantee and Trust Co. *v.* People *ex rel*..... 353
Tobin, In the matter of..... 484
Topliff *v.* City of Chicago... 215
Truax *v.* Gregory..... 83
Tuohy *ads.* Chicago City Ry. Co..... 410

V

Vance & Jones Co. *ads.* Olmstead..... 236
VanIngen *ads.* Hauk..... 20
Village of Dolton *v.* Dolton. 154

W

PAGE.
Wabash R. R. Co. *v.* People *ex rel*..... 606
Weber *ads.* Illinois Iron and Metal Co..... 526
Wells *v.* Rogers..... 292
West *ads.* Kendall..... 221
West Chicago Street R. R. Co. *v.* Petters..... 298
Western Stone Co. *v.* Muscial..... 382
Widmayer *ads.* Condit..... 623
Williams *ads.* Alsdurf..... 244
Williams *ads.* Evans..... 244
Williams *v.* People..... 173
Wolf *v.* Collins..... 281
World's Columbian Exposition *v.* Lehigh..... 612

Y

Young *v.* People *ex rel*..... 603

IN MEMORIAM.

DAMON G. TUNNICLIFF.

PROCEEDINGS IN THE SUPREME COURT OF ILLINOIS, AT SPRINGFIELD, ON FEBRUARY 12, 1902, BEING OF THE FEBRUARY TERM OF THAT YEAR.

The Hon. DAMON GEORGE TUNNICLIFF, a former justice of the Supreme Court, died at his home in Macomb, Illinois, on December 20, 1901. At the February term, 1902, of the Supreme Court, on the 12th day of February, the following proceedings were had:

Mr. Byron Pontious, addressing the court, said:

May it please the court—The duty has devolved upon me to present the following memorial adopted by the McDonough county bar at a meeting held upon the occasion of the death of our distinguished brother, DAMON GEORGE TUNNICLIFF. With the permission of the court I will read the memorial:

"The bar of McDonough county, in special meeting assembled, with profound sorrow announce the death of their oldest member, DAMON GEORGE TUNNICLIFF, at his home in Macomb, Illinois, December 20, 1901.

"Judge TUNNICLIFF was born in Herkimer county, New York, August 20, 1829. He remained on his father's farm until fifteen years of age, when he went to Ohio and assisted in the store of his uncle, Josiah Tilden. At the age of twenty he came to Illinois and engaged in the mercantile business at Vermont. He soon resolved to enter the legal profession, and began the study of law with

Blackwell & Walker, of Rushville, and afterwards continued with Blackwell & Beckwith, of Chicago. He was admitted to the bar in 1853 and first located in Chicago, but in the following year, 1854, came to Macomb and entered into partnership with Cyrus Walker, of this place, and Chauncey L. Higbee, of Pittsfield. He soon became the leading lawyer in this city, and this position was rightfully accorded to him until his retirement from practice a few years ago. During his long practice he has been associated with Asa A. Matteson, James H. Bacon, Lawrence Y. Sherman and George D. Tunnicliff. In 1885 he was appointed by Gov. Oglesby judge of the Supreme Court to fill the vacancy occasioned by the death of Pinkney H. Walker, under whose supervision he began the study of law. He was an alternate delegate to the convention which nominated Lincoln in 1860, and elector on the Grant presidential ticket in 1868, and a delegate to the republican national convention in 1876. He retired from the active practice of law in 1890, but has been associated with the firm of Sherman & Tunnicliff as counsel ever since that time.

"This bar is proud to record that Judge TUNNICLIFF was a man above reproach, a lawyer of unexcelled ability, thoroughly conversant with all the branches and details of the law and its procedure, a practitioner of tireless energy, great skill and unquestioned integrity, and a judge who filled with signal ability the exalted position of justice of the Supreme Court of this State. We, who have for many years met him in the intimate and confidential relations and sharp contests incident to the legal profession, at all times finding him well prepared for his cause, and, whether as an able colleague or a formidable opponent, ever exhibiting the utmost fairness and unsurpassed courtesy to both attorneys and courts, take pride in saying that there was nothing to criticise, but everything to emulate, strengthen and encourage. Realizing that we are deprived of his wise counsel and genial companionship, with saddened hearts we extend to his bereaved wife, children and relatives our sincere sympathy in their irreparable loss."

In support of the motion I desire to say, standing in the presence of the forum of which our late brother was once an honored member, with a full realization of the great honor I ask, yet I feel his work as a jurist, his character as a man and his ability, integrity and achievements as a lawyer, warrant me in asking that the memorial just read in your hearing be spread upon the records of

the highest tribunal of this commonwealth. He was the noblest type of American manhood—self-reliant and self-made, incorruptible in public or private life. Stern and uncompromising as an adversary, he was just and courteous to the bitterest opponent, and, when the conflict ended, genial and kind.

It was as a practicing lawyer that I knew Judge TUNNICLIFF best. Although when I became a member of the bar he was at the height of his professional reputation, yet it was my good fortune to be associated with him in the trial of some important cases. I have seen him in the freedom of the office consultation, and have listened to his arguments in the court from the standpoint of an associate and upon adverse sides. I have had occasion to feel the force of his plain, logical and convincing eloquence upon a jury. He was courteous in his manner, as well to the members of the bar as to the court. Yet he was firm and courageous in the defense of his own rights and those of his clients. A client who entrusted a case to him could rest securely in the belief that his case would be thoroughly investigated, carefully prepared and well tried.

When he began the practice of law there was less law to learn and men learned it more completely. He was not of that class of lawyers who mistake the ruts and grooves of the law for the law itself. Nor did he think a proposition over and make up his mind what the law ought to be, but he consulted the books and ascertained what the law was. How often I have felt the force of a reply he made once when I was beginning the practice. I asked him what the law upon a matter I had under consideration was, and he kindly said, "I do not just remember, but you will find something about it in the books." He knew, but it was his duty to admonish me to go to the books and dig it out of them, and he did it knowing that in after years I would thank him more for that advice than I could have done for the information sought.

It is not my purpose to indulge in any extravagant eulogy of the subject of this memorial, knowing how he valued true merit and how he disliked vain, fulsome flattery. But I can say that he realized in the beginning of his career "that long was the way and steep and hard was the climb," and started in with that tireless energy and unfagging devotion to his profession that made success certain. At the tender age of fifteen we find him leaving his home in New York State to care for himself, and when only a boy of twenty, in the year 1849, he makes his way to the almost bound-

less, trackless west, and in the little frontier village of Vermont, Fulton county, in this State, he starts in the mercantile business, but, listening to the silent call which nature makes to all great minds to seek the calling he was fitted and destined for, began the study of law, and in 1853 he was admitted to the bar, and soon thereafter located in Macomb, Illinois, and began the practice, and for nearly a half century, excepting the time he was a member of this court, following his profession in his chosen town, identified with its interests and enterprises, keeping inviolate the inner secrets of the hearts of his clients intrusted to him, faithfully guarding and protecting their property rights, and, when duty called, standing up fearlessly and nobly in defense of their lives and liberties. I am constrained to say, what an example is here for the young men of this country!

Judge TUNNICLIFF was an exception to the oft-repeated rule "that lawyers work hard, live well and die poor." He worked hard, lived well, but it can be said to his credit he did not die poor. He was a good, careful financier, and left ample means to provide for every one in any way dependent upon him. But he did not live for himself and those dependent upon him, alone. He quietly sowed seeds of kindness, and was content if others than himself did the reaping. One instance of his many acts of kindness told me by the late Judge Wheat, of our city, will suffice to show his goodness of heart. Judge Wheat came to Macomb in 1860, a young man, but afterwards became one of the ablest lawyers in our part of the State and for over thirty years was a strong competitor of Judge TUNNICLIFF, and, to put it in his own words: "All I had on earth was my law license and my ambition. I met Mr. TUNNICLIFF, who was then enjoying a good practice, and he soon, in his friendly and genial way, got out of me the facts about my condition. He then gave me desk-room in his office, took me to his home and boarded me for nearly a year, until I got a start."

Judge TUNNICLIFF was for more than forty-five years a member of the Masonic fraternity, and for many years he was high priest in the chapter. In all the relations of life, to his family, his country, his party and his order, he was a true man. To his loving wife and to his honored and accomplished sons and daughters he left all that mortal can leave. He left a noble example, an honored name, and he gave them position, education and property. "To live in the hearts he left behind is not to die."

To him life's sun has set; for him life's work is ended. There is, however, a melancholy comfort in the manner of his death. He died as one might wish to die. He retained his mental faculties to the last, and in his own home, in the midst of the friends and neighbors of many years, in the tender care of her who was nearest and dearest, with her fond image in his mind and the music of her sweet voice in his ear, God's finger touched him and he slept.

"So when a good man dies,
For many years beyond our ken
The light he leaves behind him lies
Upon the paths of men."

Mr. Henry C. Agnew also spoke, as follows:

May it please the court—I join with my brother in conveying to your honors the request of the bar association for the county of McDonough that its memorial be spread upon the records of this court.

Much has been said in the circuit court of McDonough county, as well as in the eloquent address of Mr. Pontious just delivered in this court, concerning Judge TUNNICLIFF as a lawyer and as a jurist. Too much cannot be said in this respect. He was an ideal lawyer and an ideal judge. He possessed all the natural and acquired qualifications of each. I wish at this time, however, with the permission of this court, to speak briefly of him in other regards.

As a business man,—and his business interests were many,—he gave to every detail of each transaction the same careful attention, the same earnest thought, the same persistent effort that he did to the practice of his chosen profession. As a citizen his life was beyond reproach; he loved the law and observed all its enactments. His friendship was well worth securing; it was seldom misplaced, and when once located was most loyal.

Although a great lawyer, a great judge, an exemplary citizen and a true friend, yet, far above these, his greatest and most commendable trait of character was his intense love for his family,—those dependent upon him. For their protection and their comfort no work was too hard, no sacrifice too great. For him to live was life. He lived that life as a true philosopher. This world's real enjoyments were his in a very large measure, and among them all his very highest pleasure was always had in the knowledge of the success of his children and the happiness of his family.

Hon. Simeon P. Shope, a former member of the court, who happened to be present during the exercises, added a few touching and appropriate words, in which he alluded feelingly to his association with the deceased in his practice at the bar and drew a most attractive picture of Judge TUNNICLIFF'S home life. This memorial loses much in the fact that Judge Shope's remarks were not preserved in writing.

At the conclusion of the exercises, Mr. Chief Justice Wilkin, speaking for the court, said:

It serves to remind us all of the mutations that come with the swift-moving years when we reflect that, although Judge TUNNICLIFF'S term of service as a member of this court closed less than seventeen years ago, there is not now upon the bench a single justice who then sat with him, and by far the greater number of his immediate associates have preceded him to the grave. We are all, however, familiar with the work done by Judge TUNNICLIFF while a member of this court, and know the high character of that work has not been over-stated in the memorial presented and in the appropriate remarks which have accompanied its presentation. The opinions left by him in the Reports of this State speak conclusively of his great ability and learning and are a most emphatic corroboration of the estimate of his brethren of the bar,—an estimate in which the present members of the court most heartily concur.

The memorial will be spread at large upon the records of the court, and as a further mark of respect to the memory of the deceased the court will now stand adjourned until to-morrow morning.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

STREET'S WESTERN STABLE CAR LINE
v.
LOUIS BONANDER.

Opinion filed April 16, 1902.

1. ABSTRACTS—*evidence should be condensed in narrative form in abstract of record.* An abstract of record is required by the rules of the Supreme Court to be an abridgment of the record, and where the record contains evidence the same must be condensed in narrative form in the abstract, so as to clearly and concisely present its substance.

2. BRIEFS—*brief and argument should not rehearse the evidence.* Under the rules of the Supreme Court the evidence should not be copied at length in the brief and argument, but reference should be made to the abstract of record for the same.

3. TRIAL—*when the court's refusal to direct a verdict is proper.* The court's refusal to direct a verdict for the defendant in an action by a car repairer for personal injuries is proper, under evidence that the plaintiff was directed by the defendant's foreman to work between cars on a switch track which was not the repair track; that the foreman ordered part of the cars on such track removed; that he saw a string of cars being kicked back on the switch track toward the cars where plaintiff was working but did not give plaintiff warning, although he knew he was there.

4. MASTER AND SERVANT—*servant does not assume increased hazard from master's negligence.* The risks arising from the usual method

of doing work in a switch yard is assumed by a car repairer, but he does not assume the increased hazard from the master's negligence while doing the work in accordance with such method.

Street's West. Stable Car Line v. *Bonander*, 97 Ill. App. 601, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

O. W. DYNES, for appellant.

JOHN E. HUNT, and DOUTHART & BRENDECKE, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Street's Western Stable Car Line is a corporation which owns and keeps in repair stock cars and leases them to different railroads. On August 24, 1896, some of these cars were in service on the Chicago and Northwestern railway and were temporarily in the switch yards of that railway in Chicago. The switch yards consisted of twenty-one parallel tracks, and the lines of cars on the several tracks were three or four feet from each other. Some of these tracks were repair tracks, where cars which were in bad order were stored for the purpose of being repaired, and such tracks were flagged, blocked or closed, so that the cars could not be moved while repairs were being made. There were other cars, which it was not necessary to take to the repair track, which needed slight repairs, and these slight repairs, such as tightening a nut, putting on a new one, adjusting a brake-shoe, and the like, the men did on the switch tracks, where the cars were liable to be moved and switched at any time. The appellant had in its employ a foreman inspecting its cars in the switch yards and marking those which were in bad order and were to be sent to the repair track. He also controlled the men who made the slight repairs on

the regular switch tracks. Louis Bonander, appellee, was a car repairer in the employ of appellant and had worked for it between two and three years. He and Louis Erickson, another car repairer, were set to work by appellant's foreman on that morning in the switch yards examining the cars and making slight repairs to them as they went along, wherever they found it necessary. They went to work at seven o'clock, and between ten and eleven o'clock were working on track No. 17. The foreman, inspecting cars on that track, found some beyond the place where they were at work which were in bad order and needed to be sent to the repair track. He marked the cars and directed the switching crew of the railway company to take them out. The switching crew, in obedience to the direction, pulled out from the track the west half of the line of cars, about fifteen or twenty in number, and after switching out the bad order cars kicked back on the track the remaining string of cars. One of the switching crew rode the cars to within three or four lengths of the cars which were standing still and then jumped off. The cars were disconnected from the engine, had no brakes set on them and were running free. They struck the line of standing cars and shoved them along one or two car lengths. Bonander and Erickson were making repairs on a car in the line of standing cars. Bonander was between two cars screwing up a nut on a three-quarter bolt on the draft timbers. Erickson was at the opposite end of the same car, driving a bolt in the front of the car. When the string of cars were kicked against the standing cars, shoving them along, Bonander was knocked down and one of his legs was cut off and the remaining foot was injured. Erickson, hearing the bumping before the shock came, got hold of a grab-iron on the end of the car and saved himself from being thrown down. This suit was brought by Bonander, the appellee, to recover his damages, and he obtained a judgment for $1000, which was affirmed by the Appellate Court.

But one assignment of error is argued, and that is the refusal of the court to direct a verdict for the defendant. The argument is directed solely to the proposition that the trial court ought to have given such a direction because there was no evidence that defendant was guilty of negligence, and because the injury arose from an assumed risk, and resulted solely from the negligence of the plaintiff and his fellow-servant, Erickson.

In attempting to present the questions involved the rules of the court have been violated and disregarded, both in the abstract and the brief and argument. An abstract is required by the rule to be an abridgment of the record, and where the record contains the evidence it must be condensed in narrative form in the abstract, so as to clearly and concisely present its substance. In the abstract in this case, although no ruling of the court concerning any question or answer is complained of, the entire evidence is printed at length by question and answer, with prolix and tedious examination and cross-examination, the same as it appears in the record, involving the same labor as reading the record. The rule applicable to brief and argument provides that evidence shall not be copied at length in the argument, but that it shall refer to the abstract for the same. In this case, all the testimony which counsel for appellant deems important is again printed at length in the form of question and answer, the same as in the abstract and record.

Upon reading the evidence and considering the argument of counsel we are satisfied that the court was right in refusing to direct a verdict. It was proved that defendant's foreman ordered part of the cars on the track pulled out and saw them cut off from the standing cars, and knew they would be kicked back, as they were, within a few minutes. The evidence tended to prove that he stood on an adjoining line of cars, and that he knew the plaintiff and Erickson were working among the standing cars. He gave them no notice or warning of what was

being done, and neither plaintiff nor Erickson knew the cars had been pulled out or would be kicked back. The foreman told them in the morning, in a general way, to watch out, but gave no warning of the imminent danger from the kicking of the long line of cars at the time it was done. The evidence fairly tended to prove negligence on the part of the defendant in the direction given by its foreman and failing to notify the plaintiff.

Neither could the court rightfully direct a verdict on the ground that plaintiff or his fellow-servant was guilty of negligence. The evidence for the plaintiff tended to show that plaintiff knew and appreciated the dangers of the place where he was working and was on the alert for his safety, and had been during the whole morning preceding the injury. He would look up the track to see if any cars were coming or switching being done, and would go in between the cars and do his work and get out as quickly as possible. He had worked for the defendant between two and three years, and at times had worked on these tracks, but the evidence was that he had not worked on them that year but had been working on the repair track where cars were not moved. He had had no recent experience in the methods of handling cars on these tracks. The contention that he was negligent in not having Erickson watch out for him, or that Erickson, his fellow-servant, was negligent, is not sustained by the evidence. The custom was to have one of the men stand out by the side of the car to give warning, where one of them was required to go under a car, but the evidence was that it was not the custom where they went between the cars to make slight repairs. The risks arising from the usual method of doing the work in the switch yard was assumed by the plaintiff, but not the increased hazard from negligence of the defendant in doing the work in accordance with such method.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

COLUMBUS B. HAUK *et al.*

v.

EDWARD H. VANINGEN *et al.*

Opinion filed April 16, 1902.

1. HUSBAND AND WIFE—*when conveyance to wife is void as against creditors.* A voluntary conveyance from husband to wife for the purpose of placing the title in her name is void as against a judgment creditor of the husband whose debt existed when the conveyance was made.

2. SAME—*actual insolvency not necessary to render voluntary conveyance void.* If a person largely indebted makes a voluntary conveyance and shortly afterwards becomes insolvent, the conveyance may be set aside as in fraud of his creditors.

3. SAME—*what necessary to establish husband's agency for wife.* While a husband may act as agent for his wife in investing and taking care of her funds, yet where the rights of his creditors are involved the circumstances must show that they recognized the relation of agency between them.

4. SAME—*wife's claims more readily established if rights of creditors are not involved.* If the controversy respecting ownership of property is between husband and wife alone, the right of the wife to recover will be more readily maintained than where the rights of the husband's creditors have intervened.

5. SAME—*that wife permitted husband to hold himself out as owner is a material circumstance.* That the wife has permitted the husband to hold himself out as owner of the property, and thereby gained credit, is a material circumstance where the controversy is between the husband and judgment creditors.

6. SAME—*what amounts to consent by the wife to husband's obtaining credit.* By permitting her husband to hold title to property knowing that he was engaged in mercantile business and in the constant purchase of goods, the wife consents that he may obtain credit upon his apparent ownership as it appears of record.

7. SAME—*when wife's funds become liable for husband's debts.* If a married woman obtains funds and places them in the hands of her husband to be invested by him in his name for his benefit, the property bought with such funds, as to creditors, will belong to the husband and be liable to seizure for his debts.

8. EVIDENCE—*effect where grantor swears that he had no fraudulent intent.* Where the defendant to a creditor's bill, when called as a witness by complainant, testifies that he had no intent to defraud creditors by making the conveyance, yet if the facts testified to by him show that the conveyance to his wife was voluntary and

without consideration while he was insolvent or largely indebted, such facts make the act fraudulent in law, regardless of intent.

9. PLEADING—*when amendment of creditor's bill does not introduce new cause of action.* If a creditor's bill alleges facts showing that the complainant was a creditor of the defendant, an amendment which merely fixes the time when he first became a creditor, and alleges such fact, does not introduce a new cause of action.

10. TRUSTS—*effect where a trustee mingles trust fund with his own money.* If a trustee converts a trust fund into money and mingles it with his own so that it cannot be separated, the beneficial owner occupies the position of a general creditor, and cannot follow the fund into the hands of an assignee for the benefit of creditors.

Hauk v. *VanIngen*, 97 Ill. App. 642, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This is a creditors' bill, filed on February 11, 1892, setting up the recovery in the circuit court of Cook county of a judgment on October 2, 1891, for $2254.90 by the appellees, Edward H. VanIngen and David T. Leahy, as partners under the firm name of VanIngen & Co. in the city and State of New York against the appellant, Columbus B. Hauk, impleaded with Robley D. Bruce and Henry D. Hauk, the issuance of execution on said judgment, and the return of the same unsatisfied; and also setting up the execution of a warranty deed on January 13, 1891, which was recorded on January 20, 1891, in the recorder's office of Cook county, by Columbus B. Hauk, conveying to his wife, Joanna N. Hauk, who is made a party defendant to the bill, the north forty feet of lot 22 of block 66 in Hyde Park, etc., said premises having a west front of forty feet on Washington avenue. The bill alleges that, on and before January 1, 1891, Columbus B. Hauk was engaged in the mercantile business in Springfield, Ohio, and that he became indebted to divers persons to a large amount. The bill charges that, at the time of the conveyance, Hauk was the owner in fee

simple of the property conveyed, and that then, and prior thereto, he was insolvent; that on April 17, 1891, he executed and delivered to one George S. Dial a deed of assignment of all his property real and personal, in trust for the payment of his debts, but that said deed of assignment did not embrace the premises so conveyed; and that said conveyance to Joanna N. Hauk was made without valuable consideration, or with the intent to hinder, delay or defraud the creditors of Columbus B. Hauk. The bill seeks to set aside the deed, so made by Hauk to his wife, as fraudulent as against appellees, as creditors.

Columbus B. Hauk and Joanna N. Hauk, his wife, filed an answer admitting the judgment, the issuance of execution, the engaging in mercantile business as alleged in the bill, the incurring of indebtedness, and the making of a general assignment on April 17, 1891, to Dial of Springfield, Ohio, in trust for the benefit of creditors. The answer, however, denies that Hauk was the owner of the property conveyed to his wife, but sets up that it was purchased with her money on November 9, 1889. The answer admits that, when the purchase was made on November 9, 1889, the title was conveyed to Columbus B. Hauk, but asserts that it was so taken in good faith and held by him in trust for the benefit of his wife. The answer admits the execution of the deed by Hauk to his wife on January 13, 1891, and denies the insolvency of Hauk at that time, or that the deed was made with the intention of hindering, delaying or defrauding creditors.

Subsequently, on June 9, 1899, by leave of court, the bill was amended by inserting the following allegation: "That said complainants at the time of said conveyance of the premises aforesaid, and prior thereto, were creditors of said Columbus B. Hauk." It was stipulated by counsel for the defendants below, that the foregoing amendment to the bill might be filed. Replication was filed to the answer, and the cause was referred to a master in chancery, who took testimony and made a report.

Exceptions were filed to the report both by the complainants and by the defendants below. The exceptions of the complainants were sustained, and those of the defendants were overruled by the final decree of the court, entered on June 13, 1900. This decree confirmed the report, except as to the matters therein excepted to by the complainants, and found that the equities of the cause were with the complainants; that the material allegations of the bill, and of the amendment thereto, were true; that there was due to the complainants $2157.54, with interest from September 1, 1892, at five per cent per annum; that, on or about January 1, 1891, and before that time, Hauk was engaged in the mercantile business in Springfield, Ohio, being a member of the firm of Bruce, Hauk & Co.; that the indebtedness, for which the judgment was rendered on October 2, 1891, was for goods, wares and merchandise sold by complainants below to Bruce, Hauk & Co. from July 5, 1890, to November 13, 1890; that the bulk of the goods in the account were bought between August 1, 1890, and September 15, 1890; that such goods were sold on a credit of four months; that the account was due on January 16, 1891; that, on and prior to January 13, 1891, Hauk held the title in fee simple to said premises; that, by warranty deed dated January 13, 1891, acknowledged in Springfield, Ohio, on January 16, 1891, and recorded as aforesaid on January 20, 1891, he conveyed the premises to his wife, who now holds the title to the same; that at that time he was insolvent, or in contemplation of insolvency; that he executed an assignment to Dial, as above stated, on April 17, 1891; that said conveyance so made by him to his wife was made and accepted without valuable consideration, and was, in legal effect, fraudulent as to the rights of the complainants, and other creditors; that said Columbus B. Hauk is the equitable owner of said premises so conveyed, or enough thereof to satisfy the claim of the complainants; that complainants were creditors of Hauk

when the conveyance was made; that said conveyance was fraudulent and void as to the complainants, and that the premises are subject to the payment of said debt. It was thereupon by said decree ordered and adjudged, that said deed be set aside and held to be null and void as to complainants; and that the defendants, or one of them, should within thirty days pay $2906.25, with interest, etc., and a further sum for master's fees and costs, or in default thereof, that the premises with the improvements thereon should be sold at public sale, etc.; that out of the proceeds the master should pay to the complainants the amount so found due to them with interest, and, if there was any surplus, should hold the same subject to the further order of the court. An appeal was taken to the Appellate Court, and the Appellate Court has affirmed the decree of the circuit court so as above entered. This appeal is prosecuted from such judgment of affirmance.

WILLIAM W. GURLEY, and HORACE G. STONE, for appellants:

Where a husband receives the capital fund of his wife's property there is no presumption that she intended to give it to him. *Jackson* v. *Craft*, 186 Ill. 630.

The husband may in good faith lawfully prefer the wife and discharge any legally subsisting *bona fide* indebtedness to her, even if he thereby devotes to the payment of her demands the only property to which other creditors may resort for the payment of their claims. *Earl* v. *Earl*, 186 Ill. 370; *Tomlinson* v. *Matthews*, 98 id. 178.

Complainants had no evidence on the material issues, unless it be the testimony of Mr. and Mrs. Hauk, who were called as complainants' witnesses. Their testimony is substantially all against the complainants, who can not challenge their credibility. Complainants cannot use what is favorable and reject what is unfavorable, and hence the preponderance of evidence is against them. *Sawyer* v. *Moyer*, 109 Ill. 461; *Bowman* v. *Ash*, 143 id. 664.

The property in controversy was paid for by money belonging to the wife, placed by her in her husband's hands, and her claim upon the property is superior to that of any of his creditors. *Keady* v. *White*, 168 Ill. 83.

A husband may act as agent or trustee for his wife in the management of her property without subjecting that property to the payment of his debts. *Dean* v. *Bailey*, 50 Ill. 481; *Wortman* v. *Price*, 47 id. 22.

F. W. BECKER, for appellees:

A general denial of fraud or ownership by witnesses is of little effect if the facts and circumstances narrated by them disclose the contrary. 1 Ency. of Pl. & Pr. 942; *Phillips* v. *Kesterson*, 154 Ill. 572; *Bell* v. *Devore*, 96 id. 217.

The facts tend to show a gift, rather than a loan. *Reed* v. *Reed*, 135 Ill. 482; *Duval* v. *Duval*, 153 id. 49; *Briggs* v. *Mitchell*, 60 Barb. 288; *Hughes* v. *Noyes*, 171 Ill. 575.

The identity of the wife's money, as against creditors, is lost in the mixture of funds. *Wetherell* v. *O'Brien*, 140 Ill. 146; *Kneisley* v. *Weir*, 81 Ill. App. 251.

If a married woman places her money in her husband's hands to be invested in his name and for his benefit, the property bought, as to creditors, will be liable for his debts. *Nelson* v. *Smith*, 64 Ill. 394; *Hockett* v. *Barber*, 86 id. 74; *Lowentrout* v. *Campbell*, 130 id. 503; *Reed* v. *Reed*, 135 id. 482; *Dillman* v. *Nadelhoffer*, 162 id. 625; *Keady* v. *White*, 168 id. 176; *Smith* v. *Willard*, 174 id. 538; *Iseminger* v. *Criswell*, 98 Iowa, 382; *Porter* v. *Goble*, 88 id. 565; *Romans* v. *Maddux*, 77 id. 203; Wait on Fraudulent Con. (ed. of 1889,) sec. 305.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The question involved in this case is, whether a deed, made by a judgment debtor to his wife while he was in debt, is fraudulent and void as against the judgment creditor, so as to subject the land conveyed by the deed to the claim of the judgment creditor, or whether it is a valid

deed, vesting title to the land in the wife, so that she can hold it free from the claim of such judgment creditor.

On November 9, 1889, the lot in Hyde Park in controversy here was conveyed by a warranty deed to the appellant, Columbus B. Hauk. The consideration named in that deed was $4000.00, and the amount actually paid for the lot was $4000.00. Of this amount, $2000.00 was paid in cash, and a note was given for the remaining $2000.00, which note was paid in January, 1891. The cash payment of $2000.00 was made by Columbus B. Hauk, and the note for the remaining $2000.00 was executed by Columbus B. Hauk, and, when it was due, was paid by himself. On March 24, 1890, a building permit for the construction of a house upon the lot was issued to the appellant, Columbus B. Hauk; and, in pursuance of said permit, a dwelling house was constructed upon the lot at a cost of $6000.00. This sum of $6000.00 for the construction of the house was paid by the appellant, Columbus B. Hauk, who had a bank account at the First National Bank in his own name. It was paid by checks upon his bank account, and there is some evidence, going to show that $4000.00 of the money used in the construction of the house was borrowed by him from his son, Charles D. Hauk.

On January 13, 1891, Columbus B. Hauk conveyed the house and lot to his wife, the appellant Joanna N. Hauk, the consideration expressed in the deed being $12,000.00. This deed was acknowledged by Hauk on January 16, 1891, and recorded on January 20, 1891. No money whatever was paid by Mrs. Hauk to her husband when the deed was made to her, nor is it claimed that any consideration passed from her to him at the time of the execution of the deed.

On March 1, 1883, the appellant, Hauk, formed a partnership with one Weimer for the purpose of carrying on a general clothing business at Springfield, Ohio. The firm was originally Weimer & Co., but in 1884 Bruce and

Hauk bought out Weimer's interest in the partnership, and thereafter the firm was known as Bruce, Hauk & Co. This firm began purchasing goods of the appellees soon after its organization. Harry S. Hauk, a son of Columbus B. Hauk, was in the employment of Bruce, Hauk & Co , and represented his father's interest, and attended to the correspondence of the firm. The indebtedness, for which the judgment, forming the basis of the creditors' bill filed in this case, was rendered, was contracted by the sale of goods by appellees to Hauk between July 5, 1890, and November 13, 1890. The goods were sold on a credit of four months, running from the average time covered by the account, to-wit, September 16, 1890, making the account due on January 16, 1891.

It will thus be observed that, when the indebtedness involved in the present suit was contracted, the title to the lot in question stood in Columbus B. Hauk, and not in his wife. Three days before the indebtedness matured, to-wit, on January 13, 1891, the lot was conveyed by Hauk to his wife without any consideration whatever.

At the time the conveyance was made by Hauk to his wife on January 13, 1891, he was in debt to a large amount. He owed some $20,000.00 of mercantile indebtedness as a member of the firm of Bruce, Hauk & Co., and there were mortgages upon a homestead owned by him in Springfield to the amount of over $15,000.00. On April 17, 1891, about three months after he deeded the property in question to his wife, he made an assignment. Out of the firm assets only $1600.00 were realized, and out of the homestead in Springfield only $7500.00 were realized. From the foregoing statement of facts, it appears that the appellant, Columbus B. Hauk, while largely indebted, and while upon the eve of insolvency, if not actually insolvent, made a voluntary conveyance of a house and lot worth $10,000.00 to his wife without consideration. A voluntary conveyance from husband to wife for the purpose of placing the title in her name is void

as against a judgment creditor, whose debt existed when the conveyance was made. (*Keady* v. *White*, 168 Ill. 76; *Gay* v. *Gay*, 123 id. 221; *Marmon* v. *Harwood*, 124 id. 104; *Patterson* v. *McKinney*, 97 id. 41; *Hockett* v. *Bailey*, 86 id. 74). Such a voluntary conveyance to a wife, when the grantor is in embarrassed financial circumstances, is fraudulent as to existing creditors, even though the grantor retains an estate nominally in value equal, or more than equal, to all his indebtedness, when the event shows that the property retained is not sufficient to discharge all his liabilities. (*Hockett* v. *Bailey*, *supra; Marmon* v. *Harwood*, *supra*). Actual insolvency is not necessary in order to render a voluntary conveyance void; for if a person, largely indebted, makes a voluntary conveyance, and shortly afterwards becomes insolvent, that is enough to set aside the conveyance as fraudulent. (*Patterson* v. *McKinney*, *supra: Moritz* v. *Hoffman*, 35 Ill. 553; *Morrill* v. *Kilner*, 113 id. 318). In *Morrill* v. *Kilner*, *supra*, we said (p. 321): "Where a deed is made without consideration, or for a mere nominal consideration, and the grantor is at the time largely indebted, the transaction will be regarded as fraudulent, and may be impeached by creditors. A debtor in failing circumstances is only allowed to transfer his property by making a general assignment of it for the benefit of creditors. (*Phelps* v. *Curts*, 80 Ill. 109). In this case, the conveyance was made without consideration, when the grantor was largely indebted, and we are aware of no rule under which it can be sustained." Where such a conveyance is "made in anticipation of becoming indebted, and for the purpose of defrauding creditors, and was made without consideration, it matters not whether the grantor was insolvent or not, the conveyance would be void against such subsequent creditors." (*Morrill* v. *Kilner*, *supra; Moritz* v. *Hoffman*, *supra*).

It is, however, claimed by the appellants that, although the property here in question was conveyed to

Columbus B. Hauk on November 9, 1889, yet it was purchased with Mrs. Hauk's money, or with money owned jointly by Hauk and his wife. The theory of the appellants is, that Hauk held the title in trust for his wife, and when he made the conveyance afterwards on January 13, 1891, he only conveyed to her property, which actually belonged to her. In support of the contention thus made by the appellants, proof was introduced showing that in 1858 Mrs. Hauk's father died testate, and devised to her by his will two lots in Cincinnati, Ohio. Under the law in the State of Ohio prior to 1861, as appears from the statutes of that State introduced in evidence, Hauk, by virtue of his marriage, had a freehold estate in the land of his wife, and was entitled to the possession and to the rents, issues and profits thereof. The lots, thus devised to Mrs. Hauk by her father, were sold in 1864 and 1865 by her husband. He received the money realized from the sale, and subsequently invested it with moneys of his own in a farm, but the title to the farm was taken in his own name. It is not denied that this was done with Mrs. Hauk's consent. Subsequently, the farm was sold, and the proceeds were invested in other real property. The property thus purchased was also sold. When these purchases were made, the title was always taken in the name of Hauk, the husband, with the consent of the wife, and he received and took possession of the proceeds of the sales. Upon the making of the last sale, he loaned out the proceeds thereof upon bond and mortgage. He says that he engaged in the business of lending money, and taking notes and mortgages therefor for more than twenty-five years. The investments were always made by himself in his own name, and the notes and mortgages were always taken payable to himself, and not to his wife. As is said by the Appellate Court in deciding this case, "it does not appear that up to the time of the transfer of the Washington avenue (or Hyde Park)

property by Mr. Hauk to his wife, any of the proceeds, in whole or in part, of the money, which originally belonged to her, was ever taken or held otherwise than in the name of Columbus B. Hauk."

There is no evidence, so far as we can discover, what proportion of the funds, invested in the business of lending money upon notes and mortgages, belonged to Mrs. Hauk, and what proportion thereof belonged to Mr. Hauk, if the latter did not own all the money so invested. The last sale of property, claimed to have been purchased by Hauk with his own and his wife's money, was made in 1882, and if any of the proceeds of that sale belonged to her, it is impossible to tell how much she owned, if she had any ownership therein.

During the time when the purchases and sales of real estate were thus made by Hauk, he never gave his wife any note as evidence of his indebtedness to her. During this time, a period of more than twenty-five years, she never demanded any interest of him, nor asked any settlement of him, nor made any claim of indebtedness against him, until the time of the bringing of this suit. No account was kept either by her or by him. In 1864 and 1865 her money was put into a common fund with his, and he used it in his business as money lender, if not in his business as merchant, making all investments, and taking all titles in his own name. He used this money also in support of his family, and to defray the expenses of living. Under this state of facts, the evidence does not satisfy us that Columbus B. Hauk acted as agent for his wife in investing her money, or that he owed her any money on January 13, 1891. It is true that a husband may act as agent for his wife in investing and taking care of her funds, but the circumstances must show that they recognize the relation of principal and agent as existing between themselves. Here, there was not only no express agreement between them, by the terms of which he was to act as her agent, but no circumstances are

shown, indicating the existence of any such relation as that of principal and agent between her and him.

In *Hughes* v. *Noyes*, 171 Ill. 575, we said (p. 583): "The law is well settled that a wife may loan her separate property to her husband, and he can give her security, which will be binding against both prior and subsequent creditors; but the law is equally well established that the mere fact of the wife letting the husband have her money to use is not sufficient as against other creditors. The actual contractual relations must appear by satisfactory evidence. (*Iseninger* v. *Criswell*, 67 N. W. Rep. 290; *Ronans* v. *Maddow*, 77 Iowa, 206). When the rights of creditors are involved, the law will not, from mere delivery by her of money to him, imply a promise to re-pay her, but will require more,—either an express promise, or circumstances to prove that in such matter the husband and wife dealt with each other as debtor and creditor. (*Steadman* v. *Wilbur*, 7 R. I. 481). 'A claim by a wife against a husband, first put in writing when his liabilities begin to jeopardize his future, should always be regarded with watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties alone, uncorroborated by other proof, should be rejected at once, unless their statements are so full and convincing, as to make the fairness and justness of the claim manifest.' *Clark* v. *Rosenbraus*, 31 N. J. Eq. 667."

In *Frank* v. *King*, 121 Ill. 250, it appeared that a person exchanged a tract of land, belonging to his wife, of the value of $1000.00 for other lands, taking the title to the latter in his own name by her consent, and giving no obligation to pay her anything, and he afterwards sold the land thus acquired for $1600.00, and used the money and $200.00 more of his own in the purchase of another tract, and some twelve years after exchanging his wife's land, and while largely indebted and insolvent, conveyed the tract last acquired to his wife through a trustee; and it was there held that the conveyance to the wife could not

be held good as against the husband's creditors; and it was also there held that, when a husband undertakes to prefer his wife to the exclusion of other creditors, the proof should be clear and satisfactory that she has a valid, subsisting debt, which is to be enforced and payment exacted regardless of the husband's fortune or misfortune. In the latter case it was said (p. 254): "The claim is, that the husband became indebted to the wife in the sum of $1000 in 1873. No note was ever given for the alleged indebtedness, nor was any interest ever paid on the debt, nor was it treated as a valid indebtedness, until King was in the act of failing. * * * A party, who has a valid claim against another, does not, as a general rule, suffer the claim to stand for a period of twelve years without even taking a note, without calling for interest, and without security, doing nothing whatever to collect or secure the claim. Such is not the manner in which business is done where a valid, *bona fide* debt is in existence." In the case at bar, whatever claim Mrs. Hauk may have had against her husband arose in 1864 and 1865, and it was suffered to stand, not for a period of twelve years, but for a period of more than twenty-five years without notes, interest or security, or effort to collect or secure the same. (See, also, to the same effect *Phillips* v. *Kesterson*, 154 Ill. 572; *Dillman* v. *Nadelhoffer*, 162 id. 625; *Smith* v. *Willard*, 174 id. 538).

The case of *Hockett* v. *Bailey*, 86 Ill. 74, is quite similar in its facts to the case at bar. In that case, a wife, married in Ohio in 1858, received money from her father's estate, with which she allowed her husband to purchase real estate in his own name, and which he several times traded for other property, taking title in his own name, and finally acquired land in his own name in this State, which he exchanged for another tract, and procured the conveyance to be made to his wife, he working on the lands as his own, and increasing the capital; and it was there held that the proceeds of the sale of the last named

tract were subject to the payment of the husband's debts, it not appearing that he kept sufficient property to pay his indebtedness; and it was there further held that, if a wife allows her husband to use her capital as his own, to invest and re-invest the same in his own name, and thereby obtain credit on the faith of his being the owner of the same, she will not be allowed to interpose her claim to the property, so acquired, to the injury of her husband's creditors. It is true, as was said by this court in *Jackson* v. *Kraft*, 186 Ill. 623, that "where a husband receives the capital fund of his wife's property, there is no presumption that she intended to give it to him," but proof may be introduced for the purpose of showing that there was a gift rather than a loan to the husband. Where the husband uses the property in his business, or for the support of the family, with her knowledge or assent, a gift may be inferred in the absence of a contrary agreement. (*Reed* v. *Reed*, 135 Ill. 482; *Hughes* v. *Noyes*, 171 id. 575; *Briggs* v. *Mitchell*, 60 Barb. 317).

In *Hockett* v. *Bailey*, *supra*, it was said by this court (p. 77): "If it had been the intention and purpose of the wife to retain the money derived from her father's estate as her own separate property, free from her husband, when the land was bought it should have been purchased in her own name, or at least some plan should have been adopted, by which the public would have had notice that the property purchased belonged to her, and not to her husband."

In *Wortman* v. *Price*, 47 Ill. 22, it was held that where the wife advances capital to her husband with which to engage in trade, such capital and its fruits in the business will be subject to the debts of the husband.

It is to be noted in reference to the cases upon this subject that, where there is a controversy between the husband and wife as to the ownership of the property, the right of the wife to recover will be more readily maintained than where the rights of creditors of the husband

intervene. In the latter case an altogether different question arises. (*Hockett* v. *Bailey*, *supra*; *Smith* v. *Willard*, 174 Ill. 538).

Where the controversy is between the husband and the judgment creditor, it is a material circumstance, if the wife has permitted the husband to hold himself out as the owner of the property, and thereby gained credit on the strength of such ownership. Wait on Fraudulent Conveyances and Creditors' Bills, (2d ed. sec. 305,) says: "If a wife permits her husband to take title to her lands and to hold himself out to the world as the owner of them, and to contract debts upon the credit of such ownership, she cannot afterward, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims." (*Tomlinson* v. *Matthews*, 98 Ill. 178; *Morrill* v. *Kilner*, 113 id. 318; *Smith* v. *Willard*, 174 id. 538.)

In the case at bar, the evidence shows that the firm of Bruce, Hauk & Co. on July 1, 1887, made a statement to the present appellees as to the financial condition of the firm and its members, evidently for the purpose of obtaining credit, or maintaining their credit, with the appellees. In this statement it was said that C. B. Hauk, the senior member, owned real estate to the amount of $30,000.00, and had money loaned out upon first mortgages to the amount of $15,000.00. Without attempting to discuss or analyze the evidence, it is clear that Hauk could not, at that time, have had real estate to the amount of $30,000.00 and money loaned out to the amount of $15,000.00, without including the real estate now claimed to have been owned in part or in whole at that time by his wife. This statement represented C. B. Hauk to be the owner of what is now claimed to have been owned by his wife, or by his wife and himself jointly. Again, on the 25th of February, 1890, the same firm wrote a letter to the appellees, referring to and indorsing the previous statement, and containing the following words: "Now the assets are just the same, if anything better, as father

made about $2000 last year on some real estate sold, or traded for rather, and Mr. Bruce is just the same. You have account of C. B. Hauk's (father's) property, and R. B. Bruce, hence I will not go into detail." This letter was signed in the firm name of Bruce, Hauk & Co., although written by H. S. Hauk, the son of C. B. Hauk, and his representative in the firm. So far as this record shows, the real estate, on which C. B. Hauk is therein stated to have made $2000.00 in 1889, could have referred only to the Hyde Park lot here in controversy. In that letter it is spoken of as belonging to Mr. Hauk, and not Mrs. Hauk. Again, in a letter written on December 7, 1890, by the firm of Bruce, Hauk & Co. to the appellees, it is said: "During the past year my father has put up a house and bought other property there, (in Chicago) and in course of another year will be there himself." This letter refers to the intention of the firm to remove from Springfield, Ohio, to Chicago, and the reference in the letter, embodied in the above quotation, can refer to nothing else than the house and lot here in controversy, and such house and lot are there spoken of as belonging to C. B. Hauk. It is not denied that, when the letter of February 25, 1890, was written, the title to the Hyde Park lot stood of record in C. B. Hauk, and there is no evidence tending to show that appellees were ignorant of that fact. But whether they did, or did not, have knowledge that the title to the Hyde Park lot then stood in C. B. Hauk, they relied upon the written statement, made to them as to the ownership by C. B. Hauk of the property, the proceeds of the sales of which are now alleged to have belonged to Mrs. Hauk, and to have been used in the purchase of the Hyde Park lot. By permitting her husband to hold the title to the property, knowing that he was engaged in mercantile business and in the constant purchase of goods to carry on that business, she consented that he might obtain credit upon the strength of his apparent ownership as it appeared of record.

Cases are referred to by counsel, for the purpose of showing that there was an indebtedness existing from Mrs. Hauk to Mr. Hauk, which hold that, where a married woman places her money in the hands of her husband to be invested by him in her name and for her benefit, the property bought with such money will be held to belong to her, as against his creditors. But the case at bar is not such a case. Here, she gave him her money, and permitted him to invest it in his own name and for his own benefit. It is well settled that, where a married woman obtains money either by borrowing or inheriting it, or as a devisee, and places it in the hands of her husband to be invested by him in his name for his benefit, the property bought with such money, as to creditors, will belong to the husband, and be liable to be seized for his debts. (*Nelson* v. *Smith*, 64 Ill. 394; *Hockett* v. *Bailey*, *supra*; *Lowentrout* v. *Campbell*, 130 Ill. 503; *Reed* v. *Reed*, 135 id. 482; *Dillman* v. *Nadelhoffer*, 162 id. 625; *Keady* v. *White*, 168 id. 76; *Smith* v. *Willard*, 174 id. 538; *Iseninger* v. *Criswell*, 98 Iowa, 383; *Porter* v. *Goble & Co.* 88 id. 565; *Ronans* v. *Maddows*, 77 id. 206; Wait on Fraudulent Con. sec. 305; *Township of Maple Valley* v. *Foley*, 113 Mich. 622).

It is furthermore claimed by the appellants, that the only witnesses upon the material issues involved in this case, besides Harry S. Hauk, the son of C. B. Hauk, are Mr. and Mrs. Hauk themselves, and that, as they swore that they had no intention by the execution and acceptance of the deed of January 13, 1891, to hinder, delay or defraud their creditors, the appellees are bound by their testimony upon this subject, and estopped from contradicting it. Where there is a general denial of fraud or ownership by witnesses, such denial is of little effect, if the facts and circumstances narrated by the witnesses disclose the contrary. For example, if a man swears that he had no intent to defraud his creditors by a conveyance, but the facts testified to by him show that the conveyance was a voluntary conveyance to his wife without

consideration, while he was insolvent, or largely indebted, or on the eve of insolvency, such facts so testified to by him will stamp the conveyance as fraudulent, even though he may have had no actual intention to defraud. In *Phillips* v. *Kesterson*, *supra*, we said: "Conveyances may be held fraudulent as to creditors on two distinct grounds: First, where entered into with a fraudulent intent; and second, where the law will infer fraud from the nature of the transaction, regardless of the motives of the parties. * * * The testimony of the parties to the transaction that there was no fraudulent intent, and the conveyances were made in good faith, cannot prevail against facts and circumstances, which satisfactorily show the conveyances were fraudulent as to creditors." So, also, in *Bell* v. *Devore*, 96 Ill. 217, it is said (p. 223): "It is testified that the conveyances were made and the whole transaction had in good faith and without fraudulent intent, and it is insisted that this is controlling in the case. Where the facts and circumstances show a transaction to be fraudulent, as against creditors, declarations under oath, that it was in good faith and without fraudulent intent, avail but little. * * * The opposing evidence in the case of good faith, and that there was no fraudulent intent, cannot prevail against the facts and circumstances, which show satisfactorily that the conveyances were fraudulent as against creditors." It has been held, that "the denial of fraud in an answer under oath is not conclusive on the court, if the facts and circumstances of the case are such as irresistibly to lead the mind to a different conclusion." (*How* v. *Camp*, Walk.—Mich.—427; *Morris, etc. Railroad Co.* v. *Blair*, 9 N. J. Eq. 635). "A denial by the answer of the existence of fraud will not avail to disprove it, where the answer admits facts, from which fraud follows as a natural and legal, if not a necessary and unavoidable, conclusion." (*Sayre* v. *Fredericks*, 16 N. J. Eq. 205; *Hoboken Savings Bank* v. *Becham*, 33 N. J. Eq. 53; 1 Ency. of Pl.

& Pr. p. 942). So, in the case at bar, although the appellants may have sworn in good faith to the absence of an intent on their part to commit fraud, yet we are of the opinion that the facts, conceded by defendants to exist, and testified to by themselves, constitute what is known as fraud in law as against the appellee creditors.

Appellants further make complaint, that the court allowed the bill to be amended by alleging that the debt, upon which the judgment was rendered on October 2, 1891, was contracted between July 5, 1890, and November 13, 1890, and therefore before January 13, 1891, when the deed here in controversy was made. It is claimed that by this amendment a new cause of action was set up in the bill. As we read the record, the appellants consented that the amendment should be made, and failed to demur to the original bill on account of its omission therefrom. By the failure so to demur the defect, created by its omission from the original bill, if it was a defect, was waived. (*Gage* v. *Schmidt*, 104 Ill. 106; *Monson* v. *Kill*, 144 id. 248). The original bill alleged facts, showing that appellees were creditors of C. B. Hauk, without fixing the time when they first became creditors; and the amendment merely fixed that time and alleged that fact, but it thereby introduced no new cause of action. (*Chicago City Railway Co.* v. *Hackendahl*, 188 Ill. 300). We agree with the Appellate Court in the following statement made by them upon this subject in their opinion: "This amendment introduced no new cause of action. It was but a mere enlargement of the previous allegations that they had obtained judgment against him (Hauk), and had execution issued thereon, and returned 'no property found.'" (*Morrill* v. *Kilner*, *supra*).

Even if it should be conceded that Columbus B. Hauk, in respect to the property which his wife obtained from her father's estate, occupied the position of a trustee as to the same, he mingled her funds with his own with her knowledge and consent, so that her property could

not be separated from his. Hence, as between herself and other creditors, even if he is to be considered as a trustee for her, her position is only that of a general creditor, as the identity of her money, as against creditors, has been lost by the mixture of the funds. "Where a trustee has converted a trust fund into money, and mingled it with his other moneys, so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and can not follow the fund into the hands of an assignee for the benefit of creditors. * * * Its identification is a prerequisite to the exercise of the right to follow it." (*Wetherell* v. *O'Brien*, 140 Ill. 146). Such evidence, as tends to show that the original purchase of real estate was made jointly with funds, received by Mrs. Hauk from her father's estate, and with other funds belonging to her husband, establishes the ratio of their contributions to be one-third for her and two-thirds for him. In other words, wherever land was bought with their joint moneys, the proof shows that the proportion of such moneys belonging to her was one-third, and to him, two-thirds. Even, therefore, if the evidence showed—which it does not show—that this proportion or ratio was followed out and observed in all the investments made by Mr. Hauk, two-thirds of the lot here in controversy would be his property, and only one-third thereof would belong to her. The Hyde Park lot and the improvements upon it cost $10,000.00, and the proof tends to show that they are worth that amount at the present time, if not more. Upon this theory, the interest of C. B. Hauk in the house would be two-thirds of $10,000.00, or $6666.66. The latter amount is more than sufficient to pay the judgment in favor of the appellees. Therefore, the decree is not erroneous in directing a sale of the premises.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

WILLIAM PETERSON *et al.*

v.

JOHN C. JACKSON *et al.*

Opinion filed April 16, 1902.

1. ESTATES TAIL—*estates tail abolished in Illinois.* Under section 6 of the Conveyance act, where, at common law, any person might become seized in fee tail by virtue of any devise, such person shall be adjudged to be seized thereof for his natural life only, and the remainder will pass in fee simple absolute to the person to whom the estate tail would, at the death of the first devisee, first pass, according to the course of the common law, under the devise.

2. WILLS—*devise construed as passing life estate with remainder, under section 6 of Conveyance act.* A devise to the testator's four children, "to them only and the heirs of their bodies, share and share alike," passes, under the statute, a life estate to the four children, with remainder in fee in the share of each of them to the heirs of their respective bodies, the words "share and share alike" referring to the four children of the testator.

3. SAME—*effect where a contingent remainder is devised.* Where a contingent remainder is devised the fee descends to the heir, and when the contingency happens the heir's estate opens to let in the remainder.

4. CONVEYANCES—*when interests of heirs pass by deed.* Where a testator devises property to his daughter and the heirs of her body, if she has no heirs of her body at the testator's death the remainder in fee descends to those who were the testator's heirs at his death, subject to being divested by the birth of children to the daughter, and hence their interests will pass to their assigns, and the title will remain in such assigns if the daughter dies without heirs of her body.

5. PARTITION—*partition of an estate among life tenants does not bind remainder-men.* A decree in an *ex parte* partition proceeding by a widow and her four children to divide lands in which the children had a life estate as tenants in common, subject to the general life interest of their mother under the provisions of a will, by virtue of which decree separate tracts were allotted to each child, is not binding upon the remainder-men, under the will, who were not parties, even though the decree finds that the four children were the owners of the fee.

6. LIMITATIONS—*when statute begins to run against remainder-men.* Where lands held in common by four children as life tenants are partitioned among them and each takes possession of the tract allotted to him, which he conveys, surrendering possession to his

grantee, the Statute of Limitations begins to run against the remainder-man, as to each tract, upon the death of the life tenant to whom the same was allotted, and is not postponed until the death of the last surviving life tenant; and this is true notwithstanding the partition decree had no effect upon the remainder.

WRIT OF ERROR to the Circuit Court of Stark county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

PHILIP E. MANN, and H. C. PETTETT, for plaintiffs in error.

JAMES H. RENNICK, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

James Jackson died July 2, 1871, leaving Elizabeth J. Jackson, his widow, and George Jackson, Joseph Jackson, Mary Peterson, Rachel Taylor and Elizabeth Powers his children and only heirs-at-law. He was the owner of a large amount of land in Stark county, and left a last will and testament, which was admitted to probate, and by which he devised the same as follows:

"*First*—To Mary Peterson, (formerly Mary Jackson,) my daughter, I give and bequeath the west half of the south-west quarter of section twenty-seven (27), town twelve (12) north, range seven, east of the fourth principal meridian, in said Stark county; also twenty (20) acres, being the south half of the south-west quarter of the north-west quarter of said section.

"*Second*—To George Jackson, Joseph Jackson, my sons, and to Elizabeth Jackson and Rachel Taylor, (formerly Rachel Jackson,) they being my daughters, I give and bequeath the balance of my real estate in the county of Stark aforesaid, to them only and the heirs of their bodies, share and share alike, the said real estate being the east one-half of the south-west quarter of section twenty-seven (27); the south-east quarter of same section; sixty (60) acres of the west half of the north-west

quarter of section 27; sixty (60) acres of the north-west quarter of section thirty-four (34), and in the north-west corner of said quarter section the south half of the north-west quarter of section twenty-three (23), all of the said land being in township twelve (12) north, range seven (7), east of the fourth principal meridian, and in Stark county, Illinois; also ten (10) acres of land, the same being wood land, and the east half of the south half of south-west quarter of south-west quarter of section 2, in township 12, north, range six (6), east of the fourth principal meridian and in the same county and State.

"*Third*—And unto my wife, Elizabeth J. Jackson, I give and bequeath all my goods and chattels and my personal effects, including all moneys and effects or credits, she to have and to hold the same unto her sole use and ownership, and in case of my decease before the death of my said wife she is to have and to use and enjoy all of my said real estate until her death."

Elizabeth Jackson, the daughter, was married to John Powers. The widow and all the children of the testator named in the second clause of the will having died, the bill in this case was filed in the circuit court of Stark county by defendants in error, who are heirs of the bodies of said children, for a partition of the lands devised by said second clause. A large number of parties were made defendants to the bill, some as tenants in common in fee simple with complainants, others as grantees of heirs, or as adverse claimants under deeds purporting to convey the fee from children named in said second clause, which deeds were alleged to be null and void, and still others were made defendants as mortgagees. James L. Dawson and Patrick Cain, defendants, by their separate answers admitted title to the lands to have been vested in James Jackson at his death, and claimed title to portions of the land by conveyances from children of James Jackson named in the will, and pleaded the Statute of Limitations. Ella Wickham, one of the defendants, by

her answer denied title in James Jackson, and claimed the fee by direct chain of title from the government and purchase from the devisee, Joseph Jackson, and pleaded the Statute of Limitations by possession and payment of taxes. The mortgagees and other defendants made similar claims. The heirs of Joseph Jackson answered, denying that the interests of the parties were correctly set forth in the bill, and claimed that the division should be per capita among all the heirs as a class. A number of the defendants were defaulted, and the cause was referred to the master in chancery to take the proofs and report the same with his conclusions. Objections to the report were filed and overruled and were renewed as exceptions to the report. The cause was heard and the conclusions of the master were adopted and a decree entered granting the relief prayed for, and commissioners were appointed to make partition. The defendants James L. Dawson and Patrick Cain died, and their heirs and representatives were made parties. The commissioners reported that they were unable to make partition and appraised the value of the lands. The court approved the report and entered a decree for the sale of the lands, and ordered the master to distribute the proceeds in accordance with the findings of the decree. Plaintiffs in error have brought the record here by writ of error for review.

The first and second errors assigned are, that the court erred in the construction of the will. The court construed the second clause as devising to the four children, George Jackson, Joseph Jackson, Rachel Taylor and Elizabeth Powers, estates for life as tenants in common in the lands devised, an undivided one-fourth to each, with remainder in fee simple absolute in the share of each of said children to the heirs of the body of such child, subject to the use and enjoyment of all the lands by the widow, Elizabeth J. Jackson, during her life. The argument for plaintiffs in error in the first place is, that

the devise was of the fee to the four children, and then, apparently abandoning that ground, it is insisted that the devise was to the four children named in the will and the heirs of their bodies as a class, or, in other words, that the children and grandchildren constituted a class to take the lands in equal shares between them. In our opinion the construction given to the will was correct. The sixth section of the act concerning conveyances provides, that in cases where, by the common law, any person or persons might become seized in fee tail of any lands by virtue of any devise, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first devisee, first pass, according to the course of the common law, by virtue of such devise. Under the common law the four children in this case would have become seized of the lands in fee tail as tenants in common, and under our statute they were seized thereof for their natural lives only, with remainder in fee in the share of each to the heirs of their respective bodies. (*Blair* v. *Vanblarcum*, 71 Ill. 290; *Lehndorf* v. *Cope*, 122 id. 317; *Summers* v. *Smith*, 127 id. 645.) The words "share and share alike" refer to the four children, and it is plain that the testator intended an equal division between them, with the remainder in each share to the heirs of the life tenant.

Other assignments of error question the conclusions of the court respecting the effect of the partition proceeding. After the death of the testator his widow and the five children filed their petition in the circuit court of Stark county for a partition of the lands between the four children, who were life tenants under the second clause of the will. The proceeding was *ex parte*, and a decree was entered in pursuance of the petition at the October term, 1872. The lands devised in fee to Mary

Peterson were subject to the life use by the widow, and she was one of the petitioners. The decree recited the devise to Mary Peterson and the devise of the other lands to the other four children as tenants in common, subject to the life estate of Elizabeth J. Jackson, and found that the widow was an aged woman and it was desirable to have partition of the lands, subject to her life interest, so that she might lease her interest to the several owners of the reversion to secure her support, and that no other persons had any interest in the lands, in law or in equity. By this decree commissioners were appointed to allot and divide the lands held in common, setting off one-fourth to each of the petitioners, George Jackson, Joseph Jackson, Rachel Taylor and Elizabeth Powers. The commissioners reported a partition, which was confirmed, and a decree was entered accordingly. Afterward, on September 10, 1875, Joseph Jackson and wife conveyed by warranty deed to James L. Dawson a tract of land set off to Joseph Jackson in said partition proceeding, and on October 7, 1875, Rachel Taylor and husband, by their warranty deed, conveyed a tract set off to said Rachel Taylor in the partition. These deeds purported to convey the fee, and Dawson took possession of the lands described in them in the spring of 1876 and remained in possession until his death, during the pendency of this case, when the possession passed to his widow and heirs. Dawson claimed to own the lands by virtue of the deeds and paid the taxes. Rachel Taylor, who had a life estate in one of these tracts, died in 1882, and her life estate came to an end. Joseph Jackson, grantor in the other deed, died November 17, 1898, and his life estate terminated. The widow, Elizabeth J. Jackson, died October 2, 1876, and her interest in all the lands terminated. Elizabeth Powers was in possession of the premises set off to her and claimed them in fee, and paid all taxes and built improvements on the same. On October 13, 1897, said Elizabeth Powers, then a widow, by

her warranty deed conveyed lands which had been set off to her in the partition proceeding to Patrick Cain, and he went into possession and remained in possession until he died, while this suit was pending, when the possession passed to his heirs. George Jackson died March 27, 1888, and Thomas J. Jackson, his son, on August 26, 1895, made a conveyance of an interest in one tract of the land to John Powers, husband of Elizabeth Powers. John Powers died September 15, 1896, leaving his widow surviving him, and nephews and nieces, who were his heirs-at-law. George Jackson, Joseph Jackson and Rachel Taylor each left heirs of their bodies, to whom the fee in their respective shares passed under the devise. Elizabeth Powers died February 1, 1898, without heirs of her body, having never had any child. There were other conveyances, but those above stated are sufficient to show the relation of the question raised respecting the partition proceeding.

Plaintiffs in error claim that the decree in that case was a partition of the fee, and that the decree which found the title to be in fee was conclusive, not only upon the parties to the proceeding, but also upon the remainder-men. The findings of the decree were that the children named in the second clause, who were petitioners, were the owners in fee of the premises and that no other party had any interest therein. Under that decree the lands were divided and set off in severalty to the parties, who took possession of their respective shares. The circuit court had jurisdiction and its decree bound the parties and their privies, but a stranger to the proceeding was not bound by it. The parties to the proceeding, and any who might claim under or through them, would be concluded by the decree and estopped by the record from asserting title to the shares of each other, but the owners of the fee were not before the court personally or by representation in any manner, and the court had no jurisdiction over them. They do not claim through or under

the parties to that proceeding, but derive their title by the devise in the will. The testator gave a life estate to the parents and the remainder in fee to the heirs of their bodies. The life tenants did not represent the remainder-men and could do nothing to bar their estate. The court held that the partition was of the life estates only, and that the deeds of life tenants purporting to convey the fee conveyed nothing but life estates. That holding was correct.

An important question raised by other assignments of error relates to the fee in the share of Elizabeth Powers and the contingent remainder limited after her life estate. There were no heirs of her body, so that the devise of the remainder failed, and the question is where the fee was during her lifetime. This is important in determining the effect of deeds by life tenants purporting to convey the fee. The court, approving the finding of the master, in effect held that until the death of Elizabeth Powers without heirs of her body the fee was in abeyance. The court found that the share of the real estate in which she had a life estate reverted and returned upon her death to the estate of James Jackson, the testator, and became vested in his heirs at that time, to be distributed to them under the law, and that at the time of conveyances by the life tenants they had no interest except that of life tenants. George Jackson, Joseph Jackson and Rachel Taylor each had children living at the death of the testator, and the remainder in fee in their shares vested in such children, but there was no one in being capable of taking the remainder in the share devised to Elizabeth Powers. If that remainder descended as intestate estate and vested in the heirs to await the happening of the contingency, the interest of each one would pass to his or her assigns, subject to be divested if the contingency should happen. It never did happen, and the fee would remain in their heirs or assigns. Although it was the subject of contention, it was generally held, in

case of a conveyance at the common law, that the whole estate passed out of the grantor, and in the case of a contingent remainder was in abeyance until the happening of the contingency. Livery of seizin was an evidence or testimonial of the passing of the thing from the one who made the livery. This manner of conveyance transmitted all present estate and barred both present and future rights and possibilities. The rule is stated in Sheppard's Touchstone (p. 210): "If, therefore, one make a lease for life to I. S., the remainder to the right heirs of I. D., (which I. D. is then living,) and give livery of seizin according to the deed; in this case, albeit he in remainder be not capable of this remainder, yet by the livery it shall pass out of the feoffor and shall be in abeyance during the life of I. S. So is the current of authorities; but Mr. Fearne (Butler's Fearne, p. 285,) is inclined to think the fee remained in the feoffor till it can vest under the remainder." In Williams on Real Property (p. 266) the author explains that when contingent remainders began to be allowed the judges could not make up their minds to infringe on the ancient rule that the fee simple must, on every feoffment which confers an estate in fee, at once depart out of the feoffor, and they therefore sagely reconciled the rule by affirming that during the contingency the inheritance was either in abeyance, or *in gremio legis*, or else *in nubibus*. But he says: "Modern lawyers, however, venture to assert that what the grantor has not disposed of must remain in him, and cannot pass from him until there exists some grantee to receive it. And when the gift is by way of use under the Statute of Uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, result to the grantor. So in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator." The doctrine that the fee was in abeyance prevailed only in conveyances at the common law, and not in dispositions by will. Blackstone

recognized the rule that a fee might be in abeyance in the case of a grant, but in a note it is said: "Mr. Fearne produces authorities which prove, beyond controversy, 'that where a remainder of inheritance is limited in contingency by way of use or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them.'" In Kent's Commentaries (vol. 4, p. 257,) the author says: "If a contingent remainder be created in conveyances by way of use or in dispositions by will, the inheritance, in the meantime, if not otherwise disposed of, remains in the grantor or his heirs, or descends to the heirs of the testator, to remain until the contingency happens. This general and equitable principle is of acknowledged authority. * * * It was fully and definitely settled by Lord Parker, on appeal from the rolls in *Carter* v. *Barnadiston*, that the inheritance descends to the heir in the case of a contingent remainder created by will, to await the happening of the contingency."

Where a contingent remainder is devised the fee descends to the heir, and when the contingency happens the heir's estate opens to let in the remainder. The fee remains in the heirs of the devisor if the limitation is created by will. (2 Washburn on Real Prop. 263.) That rule has been applied in our decisions. In one case a testator made a devise to his three children equally, and after the death of either of them their share to be equally divided amongst their children or their descendants. The court said: "At the time of making the will, and when the devise of the life estate took effect by the death of the testator, the daughter, Sophronia, was unmarried, and there was no person in existence to take the remainder under the will. According to the modern doctrine, there being no person *in esse* to take, the remainder vested, upon the death of the testator, in his heirs-at-law, subject to be divested when the will became operative as to

such remainder." (*Bates* v. *Gillett*, 132 Ill. 287.) In *Harrison* v. *Weatherby*, 180 Ill. 418, a material question was where the fee in lands in which there was a life estate vested upon the death of the testator. The appellants alleged in their bill that the fee remained in abeyance until the determination of the life estate of Mary A. Smith, and then descended to the heirs-at-law of Richard Smith, the testator. The court said: "The doctrine of the authorities is, that in such cases as this the fee title does not rest in abeyance during the continuance of the particular estate and before the birth of children, but that it vests in the heir-at-law *ad interim*, subject to be divested by the birth of persons who can take under the will. Having thus vested in the heir-at-law upon the death of the testator, it remains there unless divested by parties who can take under the will. When a devise is made giving a life estate to the testator's daughter and a contingent remainder in fee to her children not yet in being, and no other disposition is made of the fee, the fee descends to the testator's heirs as intestate property, and it so remains as a vested estate in fee simple until the contingency happens. The heirs in such a case take the estate subject to the condition of being divested on the contingent remainder-men coming into being." It was further held that when the testator creates a life estate and then disposes of a fee by a contingent remainder which fails, the fee goes as intestate property to the testator's heirs-at-law,—not to those who are the heirs-at-law at the time of the death of the life tenant, but to those who are heirs at the time of the death of the testator. Contrary expressions of opinion in *Madison* v. *Larmon*, 170 Ill. 65, were overruled.

Counsel for defendants in error relies upon the decision in *Frazer* v. *Supervisors of Peoria County*, 74 Ill. 282, to sustain his claim that the fee was in abeyance. It would be a sufficient answer to say that the doctrine of abeyance contended for was limited to cases of grants

and was never applied in the case of a will, and the question in that case arose under a conveyance. There was a deed to an unmarried woman and the heirs of her body. She was afterward married, and, with her husband, reconveyed the premises to the grantor. The question was whether her re-conveyance cut off the contingent remainder, and it was correctly held that it did not. The original owner, after the re-conveyance, deeded the premises to the board of supervisors of Peoria county, and it was decided that the board did not have a perfect, absolute and indefeasible estate of inheritance in the land in fee simple because there was a contingent remainder in the premises. There was, therefore, a breach of the covenant of the board that it had such title in its conveyance to Frazer. Whether the observations in that case respecting the fee being in abeyance were correct or not, the decision is not authority respecting a devise under a will.

The court erred in holding that the fee in the share in which Elizabeth Powers had a life estate reverted at her death to the heirs of the testator. The deeds of heirs conveyed their interest in such share, and while such interest would have been divested upon the happening of the contingency, it never did happen, and the title was never divested.

There is a contest as to the title to the south half of the north-west quarter of section 23 mentioned in the will. This land was set off to Joseph Jackson in the partition between the life tenants. He conveyed it by quit-claim deed January 26, 1878, to Samuel M. Adams, who conveyed it December 8, 1880, to Thomas Wickham. After the death of Thomas Wickham it passed to the defendant Ella Wickham. She claims title to the tract in fee simple by a chain of conveyances from the government. John D. Abbott had the government title and is the common source of title of the parties. The testator claimed title by conveyance from that source, and was in possession

from the year 1857 to his death. The defendant Ella Wickham claims through a deed from the said John D. Abbott, by his attorney in fact, to William M. O'Hara, prior in date to the conveyance through which the testator claimed. The next link in her chain of title is a quit-claim deed from Abram D. Harrell and Helen O'Hara Harrell, his wife, to George A. Kibbe, of all lands of the grantors in the State of Illinois, dated May 2, 1868. This deed recited that Helen O'Hara Harrell was the daughter and only heir-at-law of said William M. O'Hara. Joseph Jackson, who was in possession under his father's will, bought in this Kibbe title, and afterward conveyed, as before stated, to Samuel M. Adams. Whether the statement of Helen O'Hara Harrell in her deed that she was the daughter and only heir-at-law of William M. O'Hara was competent and sufficient to prove his death and her heirship or not, we are of the opinion that the title of James Jackson had become good, under the Statute of Limitations, by possession and payment of taxes for seven successive years. Furthermore, the evidence is that Joseph Jackson bought in the title with funds of the estate of James Jackson to protect the title, and in equity his purchase would inure to the benefit of parties claiming under the will.

As to all the lands except the above mentioned tract it was admitted by the pleadings and by stipulation that James Jackson was in possession and owned the same at his death. One tract, however, was not correctly described, but it passed to the devisees under the will by virtue of its general language. The devise was as follows: "I give and bequeath the balance of my real estate in the county of Stark, aforesaid," followed by the particular description. The plain import of the will was to devise all the balance of his real estate in the county of Stark. The tract which was misdescribed was a part of his real estate and in the county of Stark. It was devised by the will. The court could not reform the will,

but was correct in holding that the land in question passed by virtue of it.

In determining the issue raised by the defendants who set up and relied upon the Statute of Limitations, the court found that the life estates in all lands terminated at the death of Joseph Jackson, the last of the life tenants, on November 17, 1898, and held that those entitled to the remainder in the lands had no right of entry, and the Statute of Limitations could not begin to run against them as to any of the lands until his death. A conveyance by a life tenant to a third person, by words that purport to convey the fee, will not make the possession of the purchaser adverse to the remainder-men during the continuance of the life estate. (*Mettler* v. *Miller*, 129 Ill. 630.) The statute will not begin to run against a remainder-man in favor of one holding under a life tenant until the termination of the life estate. The question in this case is whether, after the partition, the statute would begin to run as to a tract of land when the life estate in that tract terminated. The land was partitioned between the life tenants, and while that proceeding had no effect as to the remainder, the decree was binding and conclusive between the parties to it as to the life estates. After the decree the several life tenants took possession in accordance with it and held their life estates in severalty in the different tracts of land. After that time one life tenant had no life estate or interest in the tracts allotted in severalty to the other life tenants, and whenever one of them died the life estate in the lands allotted to him came to an end. Whenever the life estate in one tract of land came to an end the remainder-men became entitled to the estate in possession and had a right of entry. The right of entry as to one tract was not postponed until the death of some life tenant who had no life estate or interest in it. We do not see any reason why the Statute of Limitations should not begin to run as to a tract of land at the time of the termination of the life

estate in that tract. The court erred in its findings and decree as to the Statute of Limitations.

These rules of law will be decisive, as we think, of all the questions argued in the case.

The decree is reversed and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

THE CITY OF CHICAGO
v.
THE CHICAGO LEAGUE BALL CLUB.

Opinion filed April 16, 1902.

1. MUNICIPAL CORPORATIONS—*a city is but the representative of the State in discharge of certain duties.* Although a city is regarded as a corporation created for its own benefit, still, in the exercise of many of its powers, it is but the representative of the State.

2. MOBS AND RIOTS—*the duty of city to suppress riots is of a public character.* The duty imposed upon cities to suppress and prevent riots, mobs and disorderly assemblages is public or governmental in character, and in the discharge thereof a city acts as a public agency of the State.

3. SAME—*a city has no power to call out militia to suppress riots and mobs.* The legislature has conferred upon cities various powers to aid in discharging the duty of maintaining public tranquility and suppressing disorder, which are sufficient under ordinary circumstances, but the power to call out the military forces of the State is not conferred upon them.

4. SAME—*primary duty of suppressing riots and mobs rests upon the State.* Primarily, the duty of protecting the lives and property of citizens from unlawful violence of mobs and rioters vested in the State, and this duty has not been divested nor in any degree impaired by the delegation of the various powers to municipalities.

5. SAME—*city not liable for expense of militia called in to suppress riot.* When a riot assumes such proportions that it becomes necessary to have the Governor call out the militia the general State government is the actor, and the burden of expense which its acts incur is not to be borne by the city.

6. SAME—*duty of State to suppress riot does not depend upon notification by mayor.* The duty of the State to interfere to suppress mobs and riots does not necessarily depend upon the decision of the mayor of the city or notification by him that a state of lawlessness exists which is beyond the power of the civil authorities to control.

7. SAME—*a city is not liable for rent of camp ground nor for damage thereto by militia.* Where the State sends the militia to a city to aid in suppressing a riot, the city is not liable for the rent of the property taken as a camp ground, nor for the damage done thereto, even though the property was occupied at the mayor's direction.

City of Chicago v. *Chicago League Ball Club*, 97 Ill. App. 637, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

GRANVILLE W. BROWNING, for appellant:

The State alone is liable, if any liability exists. *Curtis* v. *Allegheny*, 1 Phil. 142; *Rausch* v. *Ward*, 44 Pa. St. 389; *Chapin* v. *Ferry*, 3 Wash. 386; *San Antonio* v. *White*, 57 S. W. Rep. 858; *Worth* v. *County Comrs.* 24 S. E. Rep. 778; *Auditor General* v. *Supervisors*, 64 N. W. Rep. 570; *Prince* v. *McCarthy*, 61 id. 220; *Lahner* v. *Williams*, 84 id. 507.

The mayor of the city, in calling upon the Governor for troops to quell riots, and in any directions he may give them, is acting as the agent of the State and not as a municipal officer, in the same way that a sheriff, exercising the same authority, is not a county officer; and any liability arising from the acts or directions of either is that of the State, and not of the city or county. *Kinnare* v. *Chicago*, 171 Ill. 332; *Robinson* v. *Greenville*, 42 Ohio St. 625; *Craig* v. *Charleston*, 180 Ill. 154; *Chicago* v. *Williams*, 182 id. 135; *Gianfortone* v. *New Orleans*, 61 Fed. Rep. 64; *Cobb* v. *Portland*, 55 Me. 381; *Western Col.* v. *Cleveland*, 12 Ohio St. 375; *Gilboy* v. *Detroit*, 73 N. W. Rep. 128; *Buttrick* v. *Lowell*, 1 Allen, 172; *Maximilian* v. *Mayor*, 62 N. Y. 160.

Neither the mayor of the city nor any of its police officers had any authority to bind the city for any rental

of the grounds in question. *San Antonio* v. *White*, 57 S. W. Rep. 858.

There was no appropriation made by the city council providing for the payment of any such expense as renting camping ground for the militia, even if the city council had such powers, and consequently appellee could in no event recover. Rev. Stat. chap. 24, art. 7, secs. 2, 3.

The taking of the grounds in question by the militia was under the police power of the State, and hence no recovery can be had. *Harman* v. *Lynchburg*, 33 Gratt. 37.

CHARLES M. SHERMAN, and JOHN N. SWARTS, for appellee:

In taking appellee's property the city's officials facilitated the movement of the troops, and thereby saved the city from liability. Starr & Cur. Stat. chap. 24, sec. 27; chap. 38, secs. 399, 400; *Eagan* v. *Chicago*, 5 Ill. App. 70.

The mayor had power to enter into a contract with appellee, which is binding upon appellant, if an emergency existed making it of immediate necessity and if the contract was essential to a proper discharge of his duties as mayor in suppressing disorder and in protecting property. Starr & Cur. Stat. chap. 24, sec. 24; Rev. Code of Chicago, 1897, secs. 2180, 2182; *Barnert* v. *Patterson*, 48 N. J. 395; *Louisville* v. *Murphy*, 86 Ky. 65; *Wiley* v. *Seattle*, 7 Wash. 576; Mechem on Agency, sec. 481; *Greenleaf* v. *Moody*, 13 Allen, 363; *Forrestier* v. *Bordman*, 1 Story, 43; *New York* v. *Buffalo*, 2 Hill, 434; *Chicago League Ball Club* v. *Chicago*, 77 Ill. App. 124.

Appellant having taken appellee's property, is indebted to the latter upon an implied contract. Dillon on Mun. Corp. (3d ed.) secs. 460, 461; *Bridge Co.* v. *Utica*, 17 Fed. Rep. 316; *Allegheny City* v. *McClurkan*, 14 Pa. St. 81; *Rose* v. *Day*, 21 Ill. App. 139; *Wodyatt* v. *Connell*, 38 id. 475; Starr & Cur. Stat. chap. 80, sec. 1; *Oakes* v. *Oakes*, 16 Ill. 106; *Clayburgh* v. *Chicago*, 25 id. 440; *Hadley* v. *Morrison*, 39 id. 392.

Appellant having taken appellee's property for public use, the latter is entitled to recover from the former for its use under section 13 of article 2 of the constitution. *Braceville Coal Co.* v. *People*, 147 Ill. 66; *Elgin* v. *Eaton*, 83 id. 535; *Nevins* v. *Peoria*, 41 id. 502; *Pekin* v. *Brereton*, 67 id. 477; *Aurora* v. *Gillett*, 56 id. 132; *Aurora* v. *Read*, 57 id. 29; *Pekin* v. *Winkle*, 77 id. 56; *Shawneetown* v. *Mason*, 82 id. 337; *Railroad Co.* v. *Chicago*, 166 U. S. 226; Vattell on Law of Nations, book 3, p. 402; *Bishop* v. *Mayor*, 7 Ga. 200; *Mayor* v. *Lord*, 17 Wend. 285; *Railroad Co.* v. *Chicago*, 140 Ill. 309; *United States* v. *Railroad Co.* 120 U. S. 227.

Mr. JUSTICE BOGGS delivered the opinion of the court:

On the 6th day of July, 1894, the mayor of the city of Chicago, acting in virtue of his official authority as such mayor, notified the Governor of the State that the aid of the State militia was necessary to enable the authorities of the city of Chicago to preserve the peace and execute the public laws. The executive detailed five regiments of the State militia to aid the civil authorities of the city in so suppressing violence and enforcing the law. Two of these regiments were ordered from their homes in portions of the State outside of the city of Chicago. By the direction of the mayor these two regiments took possession of the grounds or park of the appellee league ball club, occupied the same as and for an encampment ground, and remained there for a period of twenty days. The possession of the park was taken and the troops encamped therein without the knowledge or consent of the appellee club, the owner thereof. The president of the appellee club without delay called upon the mayor with relation to the matter, and testified that the mayor said the club "would be remunerated—would have payment for the grounds." The appellee club claimed the militiamen, while in possession of the park, dug holes in the base ball diamond; drove horses pulling heavy caissons on and across the bicycle track; broke down or damaged

the turn-stiles, ticket boxes, chairs, benches, etc., belonging to the club, causing injury and damage to the park and to the property of the club in the aggregate sum of $2352.05. The club also demanded as the reasonable rental value of the ball park during the period it was so occupied by the troops the sum of $10,000, and brought this an action of assumpsit against the city to recover the said rental value of the said park and compensation for the injury and damage to its property. On the hearing the circuit court held the city was not liable to answer for the rent or to respond in damage for any injury done to the property of the club. On an appeal to the Appellate Court for the First District, prosecuted by the appellee club, the judgment was reversed and the cause was remanded for further proceedings in conformity with the opinion then handed down by the Appellate Court. (*Chicago League Ball Club* v. *City of Chicago*, 77 Ill. App. 124.) The cause was re-docketed in the circuit court, and upon a trial before the court, a jury having been waived by agreement of the parties, judgment was entered in favor of the appellee club in the sum of $4761. On a second appeal to the said Appellate Court this judgment was affirmed. The city has brought the cause into this court by a further appeal.

The only assignments of error necessary, in the view we have taken of the case, to be considered, are those relating to the action of the court in passing upon certain propositions of law in the case. Such propositions were as follows:

1. "That no liability arose against the defendant by reason of the occupation by the State militia of the premises described in plaintiff's declaration during the month of July, 1894, as testified to in this case, or by reason of any destruction of property by the militia at that time.

5. "That the occupation by the militia of said ball ground was the act of the State, and not of the city, the defendant, and the militia were in no sense the agents

or servants of the city, and their occupation of said ball park in no sense created a liability on the part of the city, nor is the city liable for any act of destruction or waste by the militia.

6. "That the occupation of the ball park by the militia was the act of the State, and not of the city, and the militia, during all said occupation, were under the orders of the State and not of the city, and such occupation, and any waste or destruction suffered on account of the same, created liability on the State only, if upon any one."

The court ruled these propositions did not state correct principles of law applicable to the case. The action of the trial court in ruling on these propositions was in obedience to the views expressed by the Appellate Court in the opinion rendered when the judgment first entered in the circuit court was reversed, but we are unable to accept as correct the principle announced by the Appellate Court.

The People, in their original sovereign capacity, adopted the constitution of 1870 in order, as they declared in the preamble to the organic instrument, "to form a more perfect government, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." The General Assembly, in whom the constitution vested the power to enact all laws for the government of the State, in order the more effectually to secure and maintain the public tranquility and promote the safety of the person and property of the citizen, determined that in the practical administration of the State government it would be wise to invest local State agencies with limited power to exercise governmental functions. Incorporated cities and villages, among others, were selected to act as such governmental agencies within their respective territorial jurisdictions, and were clothed with such powers as the law-making department deemed proper to entrust

to them. Though a city is regarded as a corporation created for its own benefit and as having been invested with corporate life and power by its own desire and at its invitation, still, in the exercise of many of the powers conferred upon it by the General Assembly, the city is but the representative of the general government of the State. Cities have powers and duties of two kinds. The first consists of public or governmental duties and powers, and the second, of private or proprietary duties and powers. Subdivision 72 of article 5 of the City and Village act confers upon cities the power, and charges it upon them as a duty, "to prevent and suppress riots, routs, affrays, noises, disturbances, disorderly assemblies in any public or private place." The duty thus imposed upon a city is public or governmental in character, and in the discharge thereof the municipality acts as a public agency of the State. It is the duty of the city to exercise every power with which it is invested, in the endeavor to discharge the duty of maintaining the public tranquility and suppressing disorder. The General Assembly granted to these municipalities various powers, intended to be sufficient, under all ordinary circumstances, to enable them to discharge the governmental function of maintaining the peace and making safe both life and property. These municipalities have, however, only such authority as the legislature has deemed it wise to grant to them, and one instrumentality for the suppression of riotous and tumultuous outbreaks, the last to be resorted to and the most powerful and effective, namely, the use of the organized military forces of the State, is not included in the grant of powers to them. In the State alone rests the power to organize, equip and maintain armed bodies of militiamen, and the control of such organized forces is committed to the general government of the State. Section 14 of article 5 of the constitution of 1870 creates the Governor the commander in chief of the military forces of the State, (except when called into the service

of the United States,) and invests him with the sole power to direct the militia to be employed to aid in the execution of the laws of the State.

It is not within the power of the General Assembly to confer upon cities and villages independent or primary power to employ the militia of the State in quelling riots and overcoming tumults, and no enactment of the law-making body of the State indicates it to be the legislative intent these municipalities should be charged with the entire burden of preserving the public peace, and preventing violence and disorder of this character within their respective limits under all and every emergency. Primarily, the duty of protecting the lives and property of the citizen from the unlawful violence of mobs or rioters rested in the State, and this sovereign duty was not divested or in any degree impaired or diminished by the delegation of power to the municipalities of the State, but the obligation of the State to preserve the public peace and tranquility and execute the laws remained in full vigor as an inalienable sovereign prerogative and duty. In recognition of this public and supreme duty the General Assembly enacted the act entitled "An act to secure the peace and good order of society, to quell riots or disturbances, to secure the execution of the laws and to provide for special deputy sheriffs, and for calling out and using the military force of the State for the preservation of the peace and the protection of property," approved June 16, 1887, in force July 1, 1887. (Laws of 1887, p. 239.) Section 7 of the act is as follows: "Whenever there is in any city, town or county a tumult, riot, mob or body of men acting together by force with attempt to commit a felony, or to offer violence to persons or property, or by force or violence to break or resist the laws of the State, or when such tumult, riot or mob is threatened, and the fact is made to appear to the Governor, it shall be his duty to order such military force as he may deem necessary to aid the

civil authorities in suppressing such violence and executing the law."

Section 5 of this act and section 13 of article 2 of the City and Village act confer upon the mayors of the different cities of the State the power to advise or make known to the Governor that the assistance of the State is needed to enable the authorities of the city, acting as representatives of the State, to suppress unlawful violence and execute the law in their respective municipalities, when, in their judgment and discretion, the emergency exists making such aid necessary. When the Governor of the State is, in pursuance of these enactments and in accordance with their requirements, so called upon to aid the civil authorities of the local governmental subdivisions of the State, it becomes his duty to exercise the sovereign powers with which he is invested, to the end that the local agencies of the State shall be provided with the necessary governmental assistance to preserve the public peace and execute the public laws in each of the municipalities. Regiments of militia dispatched at the command of the Governor to the scene of disorder and violence in any county, city or village in the State are contributions of power by the State to aid the local agencies of the State in the governmental duty of protecting the lives and property of the people and maintaining the supremacy of the laws. To the extent the powers with which a city is invested are sufficient to enable it to discharge this duty the expense is that of the city. When a tumult or riot assumes such proportions that it becomes necessary that the sovereign shall interfere and exert the supreme power of the State, to that extent the general State government is the actor, and the burden of expense which its acts incur are not to be borne by the city. It is true, the militia, when thus in a city, are subordinate to the civil authorities; but in this position of supremacy the civil authorities are not in the exercise of their private or proprietary powers,

but are acting as representatives of the State and exercising governmental functions. The authority they may exert over the militia is not supreme, but is limited to the right to direct the specific acts to be performed by the militia. The officer in command of the militia acts independently of the city officials and upon the authority of his office as to the mode and manner of accomplishing the act ordered to be performed, and is required to transmit to the Governor a copy of all orders given him by the civil authorities. (Hurd's Stat. 1899, chap. 129, art. 10, sec. 3, p. 1644.) The troops are to be governed by the code of rules or regulations which have been prepared by the Adjutant General with the approval of the Governor. (Crim. Code, chap. 38, sec. 256o.) The power and authority of commander in chief still rest in the Governor. The troops are at the scene of the disturbances by the authority of the State government, and the mayor of the city, the officers of the militia, the Adjutant General and the commander in chief are conjointly engaged, each in his respective position of rank or superiority, as the agents of the general government of the State, in all matters relating to the control, support and maintenance of the armed force of the State. The powers given to the city have proven inadequate to the exigency and the powers reserved in the State are employed for that reason. The duty of the State to so interfere to suppress tumult, riot and unlawful violence does not necessarily depend upon the decision of the mayor of the city or notification by that officer that a state of lawlessness and violence exists which is beyond the power of the civil authorities to control. Section 1 of said article 10 of the Military and Naval Code (Hurd's Stat. chap. 129, p. 1643,) authorizes the Governor to act when the fact exists and in any way is made to appear to him. There is no statute requiring cities and villages to defray any portion of the expenses attendant upon the movements of the militia of the State. There is no statutory provision for the

equipment, maintenance or support of the military forces otherwise than at the expense of the people of the State. The employment of this arm of the State government does not cast upon any local subdivision of the State the expense of the maintenance of the forces, nor are counties, cities or villages answerable for the damages to person or property occasioned by the torts or trespasses of the officers or privates of the militia. It is for the State, in its sovereign capacity, to determine whether compensation will be made out of its treasury. Of that we will not speak. It is sufficient for all the purposes of this decision the burden has not been thrown upon the appellant city.

The State has imposed upon municipalities the liability of making partial restitution for injury or damage occasioned to real or personal property (not in transit) by a mob composed of twelve or more persons. (Crim. Code, chap. 38, sec. 256*a*.) It is argued the presence and assistance of the militia will likely operate to relieve cities of much of the danger of liability under this statute, and that therefore, upon grounds of abstract justice and right, the cities should be held to be responsible for the expense of sheltering the troops on such occasions. The legal liability of a city or village cannot be predicated alone on the merits or justice of a claim. Statutory power to create the indebtedness or incur the liability must be found. If this were not so, would it not be equally consonant with reason to argue that the legislature imposed only partial liability on cities to respond in damages for injuries or damage to property by mobs, for the reason it had not deemed it proper to clothe such municipalities with all power available for the suppression of the mobs and riotous assemblages?

The judgment of the Appellate Court and that of the circuit court are each reversed, and the cause will not be remanded.

Judgment reversed.

DANIEL HILL

v.

NANCY SPENCER *et al.*

Opinion filed April 16, 1902.

PLEADING—*when a bill is bad, on demurrer, for uncertainty.* A bill purporting to be filed in behalf of an alleged remainder-man by the life tenant, his next friend, seeking to have the deed under which they claim construed to pass a fee simple title, is bad on demurrer, where it is impossible to tell from the allegations which party is in possession of the land, or to which one the allegations, upon which the right to relief is based, refer.

APPEAL from the Circuit Court of White county; the Hon. P. A. PEARCE, Judge, presiding.

ORGAN & MCKINNEY, for appellant.

J. C. PEARCE, for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from the circuit court of White county, sustaining a demurrer and dismissing a bill brought by appellant against appellees. This bill is of such a peculiar nature that it would take more space to describe it than it will to write it, and it is here produced in full, as follows:

"AMENDED BILL.

"*To the Honorable Prince A. Pearce, Judge of the Second Judicial Circuit of Illinois, in chancery sitting:*

"Your oratrix, Daniel Hill, by Martha Hill, his next friend, would respectfully show unto your honor that on the fifth day of February, 1897, Joseph Spencer and Nancy Spencer, his wife, being the grandmother and grandfather of your oratrix, made, executed and delivered to your orator a good and sufficient warranty deed conveying to your orator the south-west fourth of the south-east quarter of section 21, township 3, south, range 10, east. This deed had written on its face the follow-

ing words, to-wit: 'This deed is, however, made on the express condition that if the said Martha Hill should die leaving surviving her no heirs of her body, said real estate shall revert to said Joseph Spencer if he is then living, or to his heirs-at-law if he is then dead, and he or they shall have the right to immediately re-enter upon said land.' The deed also is in these words, to-wit: 'To Martha Hill, a child of grantors, and to the heirs of her body, a copy of the said deed is hereunto attached and made a part of this bill and marked exhibit A.' Your oratrix further shows to the court that by the said deed the son and only heir, Daniel Hill, born of her body of Martha Hill, takes, in law, a fee simple title absolute, but he shows to the court that the said grantor, Joseph Spencer, is dead, leaving a large number of heirs, who claim that by said deed your oratrix only takes a life estate in said land, and insist that, by the terms of said deed, in case your oratrix should die without issue, they, the children and heirs of said Joseph Spencer, would be the owners of said land.

"Your orator avers that by the said deed he takes a fee simple title to the said land, and that the condition in said deed written creates a cloud on the title of your orator, and renders it impossible for him to sell the same for its real value, and disquiets his title thereto; that his mother, Martha Hill, is past the time of life to have children.

"Your orator states that he is in possession of said land and has no means of quieting his title thereto in an action at law, and that the defendants refuse to sue at law or in equity to test the validity of the said condition in said deed, and having no remedy except in a court of equity, your orator prays the court that Nancy Spencer, Edward Spencer, Joseph J. Spencer, Frank V. Spencer, George W. Spencer, Mary Hanks, Sarah Hodgson, Alma Goodman, Rosa B. Spruell, Chauncy Spencer, be made defendants to this bill; that they, and each of them, be

required to make full, true and direct answer to this bill, but not under oath, the oath being hereby waived; and upon a hearing hereof that the court will adjudge and decree that the deed above described conveys to your orator a fee simple title absolute to said land, and that the condition therein written be construed not to limit or in any manner curtail said fee simple title, but that, notwithstanding said condition, the fee be adjudged to stand perfect in your orator, with full power to use, sell, convey and dispose of said land, and such other relief as to the court seems just, etc.

"Your orator prays for a writ of summons, directed to the sheriffs of White and Edwards and Wayne counties, for service on said defendants, Nancy Spencer, Edward Spencer, Joseph J. Spencer, Frank V. Spencer, George W. Spencer, Mary Hanks, Sarah Hodgson, Alma Goodman, Rosa B. Spruell, Chauncy Spencer, all of White county, to be served as defendants, and as in duty bound your oratrix will ever pray, etc.

DANIEL HILL,
By MARTHA HILL, next friend.
MARTHA HILL, *Complainant.*"

The deed, "Exhibit A" to the bill, was as follows:

"*Warranty Deed.*—The grantors, Joseph Spencer and Nancy Spencer, his wife, of the county of Edwards and State of Illinois, for and in consideration of $1000 in hand paid, convey and warrant to Martha Hill, a child of the grantor, and to the heirs of her body, of the county of White and State of Illinois, the following described real estate, to-wit: The south-west fourth of the south-east quarter of section 21, in township 3, south of range 10, east. This deed is, however, made on the express condition that if the said Martha Hill should die leaving surviving her no heirs of her body, said real estate shall revert to said Joseph Spencer if he is then living, or to his heirs-at-law if he is then dead, and he or they shall have the right to immediately re-enter upon said lands.

This conveyance is made and accepted as an advancement to the amount of the above mentioned consideration on the share of said grantee in the estate of said Joseph Spencer. Said real estate is situated in the county of White, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State.

"Dated this fifth day of February, A.D. 1897.

JOSEPH SPENCER, [Seal.]

NANCY her X mark. SPENCER. [Seal.]

"Signed, sealed and delivered in the presence of Joseph J. Spencer, Frank V. Spencer."

A general demurrer was interposed to this bill and sustained by the court, to which appellant excepted and perfected his appeal.

It is difficult to tell whose bill this is. It begins by informing the court that it is brought by "*your oratrix*," which is immediately followed by "Daniel Hill, by Martha Hill, his next friend." In reading the bill through, it will be found, in the light of the deed which is made a part of the bill, that part of the allegations relate to the complainant in the bill and part of them to his next friend. It alleges that "the grandmother and grandfather of your *oratrix* made, executed and delivered to your *orator* a good and sufficient warranty deed," etc. Further on the bill alleges that "your oratrix further shows to the court that by the said deed the son and only heir, Daniel Hill, born of her body of Martha Hill, takes, in law, a fee simple title absolute." It then alleges the death of Joseph Spencer, "leaving a large number of heirs, who claim that by said deed your *oratrix* only takes a life estate in said land, and insist that, by the terms of said deed, in case your oratrix should die without issue, they, the children and heirs of said Joseph Spencer, would be the owners of said land." The bill nowhere alleges or states who the children and heirs of Joseph Spencer are, but alleges that the condition written in the deed creates a

cloud on the title of "your *orator*." In the next paragraph it is alleged, "your orator states that he is in possession of said lands and has no means of quieting his title," etc. The bill then makes certain parties defendants, asks that they be required to answer without oath, and prays "that the court will adjudge and decree that the deed above described conveys to your orator a fee simple title absolute to said land." Then the bill is signed, "Daniel Hill, by Martha Hill, his next friend. Martha Hill, complainant."

It is probable, taking the whole bill together and the various allegations in it, that it should be construed to be the bill of both Daniel Hill and Martha Hill, but under its averments it occurs to us that it would be very difficult to tell who is in possession of the land. If the bill means that Daniel Hill is in possession, he makes no explanation of what has become of his mother's life estate or how he came to have such possession as would authorize him to bring a bill to remove a cloud under any circumstances. Nor does the bill allege that the parties made defendants thereto are the children of Joseph Spencer, or that the defendants to the bill, or any of them, have any apparent title of record that could be regarded as a cloud, or are claiming to have any title to or interest in the land. The original bill does not appear in the record. It seems from statements of counsel in their briefs that it was brought by Martha Hill and a demurrer sustained to it and this amended bill filed by leave of court. This fact may account for the peculiar verbiage of this bill and its apparent inconsistent allegations.

Appellees insist that Martha Hill is a necessary party to any bill affecting the title to this land and that she is not made a party to this bill. While, as we have already stated, the averments are so contradictory and uncertain, as set forth in the bill, that it is very difficult to tell what was in the mind of the pleader when it was drawn,

still we are inclined to hold that Martha Hill is a party complainant to the bill. In a number of places in the bill certain allegations are made by her as *oratrix* and in a number of other places averments are made by *orator*, and in some places the averments are so confused that it is impossible to tell from the bill who it is that makes the allegations. It does not appear that any of the allegations are made by both Daniel and Martha Hill, and the prayer is only by Daniel Hill, but the bill is signed "Daniel Hill, by Martha Hill, his next friend," and is also signed "Martha Hill, complainant." But as we have before pointed out, one of the allegations in the bill is that the makers of the deed delivered it to Daniel Hill, the orator, while the deed itself is to Martha Hill, and Daniel Hill is nowhere mentioned in it, and there is no sort of explanation of what has become of the title or life estate of Martha Hill. The allegation that Martha Hill is past the time of life to have children is meaningless, as she is, in law, presumed to be capable of bearing children as long as she lives, unless more than a mere matter of age is stated in the bill. It is apparent that the court could not decree an absolute title in Daniel Hill and authorize him to dispose of the land with Martha Hill still living and having a life estate in the land with the possibility of other issue. In view of the uncertainty of the allegations and the many contradictions made by the various allegations of the bill and the nature of the prayer therein, we think the chancellor was justified in sustaining the demurrer to it. We do not deem it advisable or necessary to now construe this deed, as we regard the matter not properly before us.

The decree of the circuit court sustaining the demurrer and dismissing the bill is affirmed.

Decree affirmed.

MARY C. CHILVERS, Admx. *et al.*

v.

SARAH RACE *et al.*

Opinion filed April 16, 1902.

1. DEEDS—*presumption of delivery in case of voluntary conveyance is strong.* The law presumes more in favor of the delivery of deeds in cases of voluntary settlements than in cases of bargain and sale.

2. SAME—*marriage is sufficient consideration for a settlement on wife.* Marriage is sufficient consideration for a trust deed by a husband settling a life estate on his wife, with a life estate to himself if he survived her, and with remainder to her children; and in such case, if the title passes to the trustee for the benefit of the wife it passes for all purposes of the deed, including the provision for remainder.

3. EVIDENCE—*declarations of deceased parents competent to establish parentage of children.* Where defendants to a bill for partition claim title to the property as children of the deceased life tenant, their relationship is established by the uncontradicted declarations of the life tenant that they were her children, and by testimony that they had always lived with her during their childhood.

4. REAL PROPERTY—*when widow has no lien on property for money loaned husband.* Where a husband has only a life estate in property, the fact that the wife advanced him some money to improve the property and recorded the notes does not entitle her to a lien upon the interest in remainder after the husband's death.

5. SAME—*life tenant cannot create charge against remainder-man by improving land.* A life tenant cannot bind the remainder-man by a lease, in which he stipulates to purchase, at the termination of the lease, the buildings erected thereon by the lessee.

6. COSTS—*when the defendants to partition should not pay any costs.* Where a bill for partition denies altogether that certain of the defendants have any interest in the property, and such defendants file a cross-bill claiming the whole estate, which claim is sustained by the decree to the exclusion of all others, such defendants should not be required to pay any portion of the costs.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. CHARLES G. NEELY, Judge, presiding.

This was a bill for partition in the circuit court of Cook county, filed by plaintiff in error Mary C. Chilvers, widow of Robert Chilvers, deceased, alleging that she is the owner of the undivided half of the real estate de-

scribed in the bill. It appears from the evidence and pleadings that Robert Chilvers, about the year 1850, purchased a forty-acre farm in DuPage county, on which he lived until he moved to Chicago, ten or twelve years later, and rented his farm to William Reader. In 1853 he married Elizabeth Poole, who died in 1880. She had been married twice before, the first time to George Justice, who died in 1851. She had two children by her marriage with Justice, namely, Sarah Race and Frank Justice, defendants in error, who, after her marriage with Chilvers, lived with their mother and Chilvers, their step-father, until they reached their majority, and subsequently visited them. After the death of Justice the said Elizabeth had married John Poole, but he died soon after, leaving no children. She then married Robert Chilvers, as above stated. There was a child born to Robert and Elizabeth Chilvers, but it died in infancy. In 1858 Robert Chilvers bought lots 30 and 31, in block 18, in the canal trustees' subdivision, etc., in Chicago, which property is known as Nos. 367 and 369 West Taylor street. In the same year he also bought, by a contract in writing, lot 107 in Crane & Wesson's subdivision, etc., which is known as No. 210 Blue Island avenue. The title to this lot was not finally conveyed to him till 1880, when the heirs of the original vendor, in pursuance of a decree for specific performance, conveyed to him.

On March 31, 1859, Robert Chilvers and John Taylor signed, sealed and acknowledged a certain trust deed, in which it is recited that "Robert Chilvers, party of the first part, is desirous of making a suitable provision for the support and separate maintenance of his wife, Elizabeth Chilvers, party of the third part, during her natural life, and to that end hereby intends to execute this conveyance to John Taylor, party of the second part, for the sole and separate use of his wife, independent of her husband, and he therefore, in consideration of the premises and the sum of one dollar, grants, bargains, sells, etc.,

unto John Taylor, his heirs, etc., lots 30 and 31, and all his right, title, interest, claim and demand in lot 107, in trust, nevertheless, for the following purposes, that is to say, in trust for the sole and separate use, benefit and behoof of the said Elizabeth Chilvers, party of the third part, during and for her natural life, independent of her coverture and free from the debts and control of her said husband, and to collect and receive all the rents, issues and profits of the said premises herein granted and described, and pay the same to the said Elizabeth Chilvers or her order, in writing, as she may at any time direct, for her sole and separate use and disposal, and to give acquittances for the same independent of her husband aforesaid. And upon the further trust, upon the death of the said Elizabeth Chilvers, the said party of the first part surviving, then to collect and receive the rents, issues and profits of said premises and pay the same to him, the said Robert Chilvers, or his order, in writing, during his natural life, and upon his death to convey said premises, in fee simple absolute, to the children of said Elizabeth Chilvers by a former husband, and to the children then living of said Robert and Elizabeth Chilvers, party of the first and third parts, to be equally divided among them, share and share alike. And upon the further trust, the said party of the first part dying during the lifetime of the said Elizabeth Chilvers, his wife, that then and in that case upon her death to convey said granted premises aforesaid in fee simple absolute to the said children herein mentioned, and in like manner and form as herein prescribed and required, their heirs and assigns forever: *Provided always*, that in case the said party of the second part shall die or refuse or neglect to act in the execution of any of the trusts aforesaid, he or his executors or administrators shall convey said premises in fee, and pay over the whole of the trust estate, for the time being, unto such person or persons as the surviving party hereto may, by writing under his or her hand alone, nominate

and appoint to be the substituted trustee of the trusts of these presents, and the receipt of such new trustee shall be a complete acquittance to the said party of the second part, his executors and administrators."

April 9, 1859, Robert Chilvers and John Taylor signed, sealed and acknowledged another trust deed, containing substantially the same language as the preceding, but conveying the forty-acre farm in DuPage county. Both of these trust deeds were signed and acknowledged by the trustee and were recorded in the proper offices shortly afterward. They were found among Chilvers' papers after his death. John Taylor, the trustee, died a few years after the making of these deeds, and no new trustee was ever appointed. The evidence does not show whether the trustee ever had possession of the trust deeds or whether he ever acted under their provisions. There was evidence given in relation to the matter, but it was afterwards stricken out as incompetent. There was no evidence as to who collected the rents prior to the death of Elizabeth Chilvers, but Robert Chilvers collected them thereafter to the time of his death.

After the death of Elizabeth Chilvers, intestate, letters of administration were granted on her estate in DuPage county, and the administrator filed an inventory, in which he described all the real estate which is in controversy in this case, adding that the title was in John Taylor as trustee, for the use of Elizabeth Chilvers during her life, then to Robert Chilvers during his life, then to the children of Elizabeth Chilvers in fee. Citation was issued against Robert Chilvers, and on a hearing he was ordered to pay over a certain sum of money found due the estate of Elizabeth Chilvers, and was further ordered to have the first trust deed re-recorded, as the record of it had been destroyed in the great Chicago fire of 1871. The deed was recorded April 25, 1881.

In May, 1890, Robert Chilvers married the plaintiff in error Mary C. Chilvers, who lived with him till the time

of his death. No children were born of this marriage. Robert Chilvers died September 6, 1896, leaving a last will and testament, which was duly probated in Cook county, and by which he left to Sarah Dawson, defendant to the bill, after certain legacies of personal property, the rest and residue of all his property, real and personal, but without describing it. The executor nominated in the will resigned, and Mary C. Chilvers was appointed administratrix with the will annexed. Thereafter the widow filed her renunciation and elected to take under the statute.

In 1895 Robert Chilvers built a brick building on lot 30, for which purpose Mary C. Chilvers advanced him $2000, as she testified, and took from him two notes for $500 each for part of the indebtedness. The notes stated that the money was to be applied on the building being then erected on No. 369 West Taylor street. These notes were filed for record, and she claimed that she thereby obtained a lien against this property. Prior thereto, in 1883, Robert Chilvers made a twenty-five year lease of lot 107, which lease, by assignment and consent of the lessor, came to John H. Clough, who having died is now represented on the record by Susan Clough, his executrix. At the end of the term Chilvers was by the terms of the lease to purchase the improvements at their value, not to exceed $4000.

The defendants in error, Sarah Race and Frank Justice, answered complainant's bill and filed their cross-bill, setting up their claim to the property in fee under the trust deeds, and Sarah Dawson also filed a cross-bill, contesting the claim of Mary C. Chilvers to a lien but admitting that she owned the undivided half of the property. Issues were made on the bill and cross-bills, and the cause was referred to the master to take testimony and report the same, with his conclusions. On the coming in of the master's report the cause was heard before the court on exceptions filed by the plaintiffs in error,

but these exceptions were all overruled, and a decree was entered establishing the title in fee in defendants in error, Sarah Race and Frank Justice, and denying any relief to any of the plaintiffs in error, as recommended by the master. Thereupon this writ of error was sued out. The court apportioned the costs equally among all the parties, and defendants in error have assigned cross-errors on this apportionment.

WILLIAM A. CONOVER, LESLIE H. WHIPP, and GARDNER & BURNS, for plaintiffs in error.

HILLIS & MCCOY, (CHARLES S. MCCOY, of counsel,) for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

The principal contentions of plaintiffs in error are, first, that the trust deeds were never delivered; and second, that they are invalid even if delivered. It appears from the deeds themselves that they were signed and sealed by Chilvers, the grantor, and Taylor, the grantee and trustee. They purport to have been signed, sealed and delivered in the presence of W. H. Davis. They were acknowledged by both Chilvers and Taylor, the notary certifying, in the statutory form, that they acknowledged that they signed, sealed and delivered them, and the certificate of the recorder shows they were filed for record and were duly recorded shortly after their execution. It also appears that the deed to the Cook county property was re-recorded in 1881.

That the execution and recording of a deed by the grantor is *prima facie* evidence of delivery is well established, but this presumption is liable to be rebutted. In *Union Mutual Life Ins. Co.* v. *Campbell*, 95 Ill. 267, it was said that it is successfully rebutted when it is shown that the deed was not in the nature of a family settlement or of a gift to a minor, but is intended to confer no benefit upon the grantee, and its execution and recording

are wholly unknown to him until after the death of the grantor. In *Weber* v. *Christen*, 121 Ill. 91, it is said (p. 98): "It is true, as a general propostion, where nothing appears to show a contrary intention, that if the owner of an estate makes a conveyance of it and places the deed upon record without the knowledge of the grantee, the title will nevertheless pass, if the latter, on being informed of the transaction, assents to it. And where the conveyance is a voluntary settlement, or to one who is not *sui juris*, a formal assent need not be shown, as it will, if nothing further appear, be presumed." The question of the knowledge of the grantee is eliminated in this case, as he and the grantor appear to have signed and acknowledged the deeds together. It was shown, however, that they were in the possession of the grantor in 1876 or 1877, after the death of the trustee, and again in 1884 or 1885 or 1886, and that they were found in his safety deposit box after his death; but there is no testimony showing in whose possession they were prior to 1876, or at the other times not covered by the above dates.

William Reader, an old acquaintance and neighbor of the family, testified that when about to lease the DuPage county property, in 1888, he had a conversation with Chilvers about the extent of his estate or title to the property; that he said to him: "Mr. Chilvers, now you have only a life lease on this property and you are to lease it to me for five years; suppose you died before my five years are out?" "Why," he said, "that is all right; Mrs. Race and Frank Justice get my property when I die and that will be the end of it, and they won't hurt you." He testified that this conversation took place in the office of John Humphrey, in Chicago, but Humphrey testified that he never heard of it and did not think it occurred. After the expiration of this lease Reader continued on the farm without another lease, Chilvers reducing the rent from time to time because he would make no improvements on it. Reader testified that Chilvers said "he only had it

until he died and to let them do the improvements; that the children, Frank and Sarah, might do the rest of it." This conversation was not contradicted. Mrs. Pitcher testified that she never heard about the interest Elizabeth Chilvers had in the property during her husband's lifetime, but that she heard him say his wife would have plenty when he was gone; that it was hers. After the death of Elizabeth Chilvers an administrator was appointed on her estate, who cited Robert Chilvers to give account of her property and papers in his hands. Chilvers denied having any property or papers of hers in his hands. On a trial of the issue in the county court of DuPage county he was ordered to pay her estate $1190.43 and to have the deed to the Cook county property re-recorded. It seems that Frank Justice was the moving party in the matter, as he made some of the affidavits, although he was not a party to the record. An appeal was taken from this order, but it was afterwards stricken from the docket. The deed was re-recorded shortly after the order was made. In the spring of 1896 Robert Chilvers and Mary C. Chilvers went to John Humphrey's office to have the abstract of title to this property examined by him, and were told by Humphrey that the record title was in John Taylor, and it would be useless to make the deed to the property she wanted, to secure the money she said she intended to let him have.

In regard to the control of the property and the collection of the rents there is no evidence about the period prior to the death of Elizabeth Chilvers, except as to part of the year just preceding, and all such control and collection of rents subsequent thereto would not be adverse to Robert Chilvers' equitable life estate therein, but in subordination thereto. There is no evidence as to the acts of John Taylor, the trustee named in these deeds of trust, in regard to the trust. It seems that he died a few years after their execution and no new trustee was ever appointed. The trust deeds provide that if

the trustee shall die or refuse to act, Robert or Elizabeth Chilvers shall appoint a new trustee. This was not done, but Chilvers seems to have acted as his own trustee.

Counsel for plaintiffs in error insist that the fact that the deeds were found in the grantor's possession rebuts the presumption of delivery arising from the recording of the deeds and the acceptance of the trust by the grantee. But there is no evidence whatever in the record as to who had the deeds from 1859 to about 1876. After the death of the trustee, and more especially after the death of Elizabeth Chilvers, it would have been natural, and not improper, that Robert Chilvers should take possession of the deeds and hold them. He had a life interest under them and the power to appoint a successor in trust. The admissions of Chilvers to Reader against any interest of his in fee simple and in confirmation of the deeds are some evidence on the question as to the effect which he ascribed to his acts in conveying the property. The fact that one of the deeds was re-recorded in 1881 is also proper to be considered. If the deeds were never delivered and never became operative there was no reason why one of them should have been again recorded. "It must be remembered that the law presumes much more in favor of the delivery of deeds in case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale. The same degree of formality is never required, on account of the great degree of confidence which the parties are presumed to have in each other, and the inability of the grantee frequently to take care of his own interests." (*Union Mutual Life Ins. Co.* v. *Campbell*, 95 Ill. 267.) The settlement contemplated by the deeds was a voluntary settlement for the benefit of the wife of the grantor and for her children, members of his family, and was made before the married women's acts were passed, and when it was usual, in making such settlement upon the wife, to convey property to a trustee for her benefit. The property was to be

held under these deeds in trust for the wife for her life, then for the grantor for his life, and then to be conveyed in fee to the children of the wife by a former husband, and to her children, if any, by the grantor.

Taking into consideration the presumptions of law and all the facts and circumstances in connection with the grantor's dealings with the premises, we think the conclusion is fairly warranted that the deeds were delivered and became operative.

Second—The validity of the deeds is attacked on the grounds that the consideration was only nominal and that defendants in error were strangers in blood to the grantor. As said above, they were in the nature of a voluntary settlement for the benefit of the wife and her children, and marriage has ever been held a sufficient consideration for a settlement on a wife, as against all but existing liens. Such settlements are sustained, both in law and in equity. (*Sanford* v. *Finkle*, 112 Ill. 146.) Defendants in error were children living with their mother and step-father at the time the deeds were made,—members of his family; and besides, the remainder was limited to all the children of grantor's wife, including any children of the grantor, if there should be any in being at the death of the life tenants. This shows that he put his step-children on an equality with his own. If the title passed to the trustee for the benefit of the wife, it passed for all purposes of the deed, including the remainder to defendants in error. This was an executed trust, for it was fully and finally declared by the grantor, so that nothing further remained to be done to make it effective, and as such it will be executed in equity. *Lynn* v. *Lynn*, 135 Ill. 18.

It is contended that there is no proper proof in the record showing that defendants in error are the children of Elizabeth Chilvers. Sasan Pitcher testified that she had known Elizabeth Chilvers for forty-three years before she died; that she had told her that she had two

children by George Justice,—Susan and Frank; that witness knew them in Chicago and in Downer's Grove, while they were living with their mother; that during their childhood they never lived anywhere else than in the home of their mother; that after their mother's marriage with Chilvers they lived in the family all the time until they were large enough to work. William Reader testified that he had known the defendants in error ever since they were children, and had seen them frequently when they lived on the Chilvers farm; that Chilvers said Frank and Sarah would get the property after his death. Here were proved the declarations of Elizabeth Chilvers that the defendants in error were her own children by a former husband, and also the fact that these children lived with their mother and step-father as members of the family. No one, certainly, was more competent to state who her children were than the mother. The declarations of parents who are deceased are proper evidence in such cases. (*Metheny* v. *Bohn*, 160 Ill. 263.) As the relationship is sufficiently established by this testimony, which was not contradicted by any one, it is unnecessary to pass on the question of the admissibility of the evidence of Frank N. Race, the son of Sarah Race, that she and Frank Justice were reputed in the family to be the children of Elizabeth Chilvers.

The court below decided that Mary C. Chilvers had no interest in or claim on the property, and that the estate of John H. Clough had no valid interest or claim by virtue of his lease. The decision of the court was right. When Chilvers died his estate ended and there was nothing to pass to his widow, and she acquired no lien on the remainder by the loan to him and the notes he gave her.

The claim of the Clough estate was for the amount stipulated in the lease at which the lessor covenanted to buy the improvements at the expiration of the lease. As the lessor was merely a life tenant he could not execute a lease with covenants binding on the remainder-man.

Nor can the lessee plead his ignorance of that fact. The deed to this Blue Island avenue property had been re-recorded in 1881, and the lease was made in 1883. The lessee was bound by the record to know the state of the title. It does not appear from the evidence when these improvements were put on the premises. A life tenant, by placing permanent improvements on the land, however much they may enhance the value of the estate, can not thereby create a charge for the money thus expended against the remainder-man. Such improvements must be deemed to have been made by the life tenant for his own benefit and enjoyment during the continuance of his own estate, and upon the termination of the life tenancy, they being a part of the realty, pass as such to the one in whom the remainder vested, and he takes them without any liability to recompense the life tenant for his expenditure. (*Hagan* v. *Varney*, 147 Ill. 281.)

The apportionment of the costs is assigned as cross-error. Each party was ordered to pay one-fifth of the costs. The original bill was a bill for partition, to which defendants in error filed their cross-bill, claiming the whole estate. As to the interests of defendants in error, the original bill merely alleged that Sarah Race claimed to have some interest and that Frank Justice was dead, the latter allegation being afterwards stricken out. It made no attempt to set out the interests as claimed by defendants in error. The result of the suit is that the rights of defendants in error are fully established to the whole of the property in controversy, to the exclusion of all others. While the adjudication as to costs is in the discretion of the court in chancery cases, still it should be based upon equitable grounds, and this court has in some cases disapproved of the orders of the chancellor in relation to costs. (*Drake* v. *Phillips*, 40 Ill. 388; *Linton* v. *Quimby*, 57 id. 271; *Price* v. *Blackmore*, 65 id. 386.) The interests of defendants in error were controverted altogether by the plaintiffs in error, and they were compelled

to file their cross-bill for relief. We are of the opinion they ought not to be compelled to pay any part of the costs in this case.

The decree will be affirmed in all respects except as to the costs, and in that respect it will be modified, and the plaintiffs in error will be required to pay all the costs, both in the court below and in this court.

Decree modified and affirmed.

MARY E. TRUAX

v.

WILLIAM H. GREGORY.

Opinion filed April 16, 1902.

1. WILLS—*the word "absolute" may be given a restricted meaning and operation.* The word "absolute" may be used in connection with an interest in property and yet not be regarded as the equivalent of "unqualified," and if the context of the instrument warrants it the word may be given a restricted meaning.

2. SAME—*will construed as not devising the fee to a right of way.* A devise to the testator's son of certain described lands, "with the right of way from the highway near my house," etc., lying over certain land devised to his daughter, which devise concludes with the words, "to be his absolutely at and after my death," will not be construed as passing the fee in the land occupied by the right of way to the son, but as giving the son an easement of passage in the right of way as it was used by the testator during his lifetime.

3. EASEMENTS—*when party has no right to remove gate from right of way.* Where the gift of a right of way to land devised is not of a general open way but of a particular and established way, which was, during the testator's lifetime, closed by a gate at the highway, the party to whom the right of way is given has no right to break down or destroy the gate, but must open and close the same when he passes through.

WRIT OF ERROR to the Circuit Court of McHenry county; the Hon. C. H. DONNELLY, Judge, presiding.

V. S. LUMLEY, for plaintiff in error.

D. T. SMILEY, for defendant in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery filed by the plaintiff in error for a decree establishing and declaring the boundary lines of a certain "right of way" created by the will of Stephen O. Gregory, deceased, over certain lands devised to her by said testator, and to restrain the defendant in error, who is her brother, from breaking down, removing or leaving open the gate at the easterly terminus of such right of way.

Stephen O. Gregory died January 7, 1892, leaving him surviving three children,—the plaintiff in error, the defendant in error and Mrs. Cordelia Stevens. He left a last will, which bore date June 20, 1889. Only the third, fourth and fifth clauses of the will are important to be considered here. They are as follows:

"*Third*—I give and bequeath to my son, William Henry Gregory, the following described real estate, to-wit: The north-east quarter of the south-east quarter of section 21; also the undivided one-half of the south-west quarter of the south-west quarter of section 22, with the right of way from the highway near my house in section 22 to the said north-east quarter of the south-east quarter of section 21; also one rod of land off the south-west corner of the north-west quarter of the south-west quarter of section 22 to connect the said two tracts of land, all in town 44, McHenry county, Illinois, to be his absolutely at and after my death.

"*Fourth*—I give and bequeath to my daughter Cordelia Stevens the following described real estate, to-wit: The south-west quarter of the north-west quarter of section 22; also the undivided one-half of the south-west quarter of the south-west quarter of section 22, with the right of way from the highway near my house in section 22 to the above described lands, all in township 44, McHenry county, State of Illinois, to be hers absolutely at and after my death.

"*Fifth*—It is my will and desire that my daughter Mary Esther Truax have the use and benefit of all the balance of my real estate that I may die seized of, (except that hereinbefore named and described,) to be subject to her use, control and benefit during her lifetime, upon the express condition and with the understanding that should my beloved wife (her mother) survive me, that all her wants and expenses during her life and at her death be fully and well provided for by my said daughter Mary Esther Truax."

On a hearing it was shown by testimony that was not controverted that a public highway known as the Woodstock and Crystal Lake road passed through the lands owned by the testator, from the northerly point of its entrance in a south-easterly direction, leaving a part of two tracts of his land, perhaps in the aggregate forty acres of land, on the north-easterly side of the highway, and the remainder, consisting of about two hundred and eighty acres, on the south-westerly side of the highway; that the residence of the testator and his barn and other outbuildings were located on the lands lying north and east of the highway; that the lands to be enjoyed by the plaintiff in error under the will abutted upon the highway upon either side thereof, and the lands given to the defendant in error and Mrs. Stevens were situate wholly west of the highway, and could only be reached from the highway by passing over the lands given by the will into the possession of the plaintiff in error; that the testator, at the time of his death and for many years prior thereto, and prior to the execution of the will, maintained a passageway leading from the south-westerly side of the highway, nearly opposite his dwelling house, south-westerly through his fields and pasture lands to the more distant tracts; that he maintained fences on either side of this passageway for a portion of its length; that he had constructed a bridge to carry it across a ditch or water-

way and had graded and graveled a portion of such passageway; that the testator erected and maintained a gate at the easterly terminus of this passageway, which was at the public highway; that the passageway so maintained by him beyond the line of the fences was well established and known to the litigants, and that it was this right of way which was intended to be granted by the will of the deceased father of these litigants.

The court entered a decree defining the boundaries of this right of way, and with that finding of the court both parties are content. The right of way is located entirely over and upon lands devised to the plaintiff in error by the fifth clause of the will of her father. It, however, appeared that the defendant in error claimed the will invested him with the absolute title in fee simple to the land upon which the right of way was located, and that under this claim he had broken down and removed the gate which the plaintiff in error maintained at the easterly end of the right of way, being the point at which the right of way entered into the highway. The decree rendered by the chancellor made no finding as to this claim of absolute title in fee to the land on which is located the right of way, but found and decreed that the defendant in error was entitled, by virtue of the last will and testament of said Stephen O. Gregory, deceased, to an open, unobstructed and unrestricted right of way, and was not required to open and shut any gate at the easterly terminus thereof, and that the plaintiff in error had no right to maintain a gate there, and denied the prayer of the bill for a decree restraining the defendant in error from breaking or removing the gate at the said easterly terminus of said right of way. This writ of error brings into review the correctness of the decree with reference to the right of the plaintiff in error to maintain a gate at the easterly terminus of the right of way.

If, under the true construction of the will, absolute title in fee to the right of way was devised to the defend-

ant in error, the decree is unquestionably correct. But we do not so construe the will. The argument in favor of this construction is based wholly upon the meaning which it is urged must be given to the word "absolutely," used in the concluding portion of the third clause of the will. The word "absolute," when used in connection with a gift or grant of personal or real property, has been frequently interpreted to carry a fee. But it is not to be given that as its fixed and unvaried meaning. The context of the instrument in which the word appears may determine the effect to be given it. It may be used in connection with an interest in property and yet not be regarded as the equivalent of "unqualified." (*Williams* v. *VanCleve*, 7 T. B. Mon. 393; *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421.) In *Smith* v. *Bell*, 6 Pet. 72, the word "absolutely," used with reference to an estate in personalty, was held to be qualified by other words of the bequest, and thereby explained to mean only such absolute rights as a tenant for life could enjoy. In *Bradley* v. *Wescott*, 13 Ves. 450, the word was given a similarly restricted meaning and operation. In *Boyd* v. *Strahan*, 36 Ill. 355, the cases of *Smith* v. *Bell*, *supra*, and *Bradley* v. *Wescott*, *supra*, were cited with approval and the doctrine of those cases applied to the controversy then under consideration. In *Kratz* v. *Kratz*, 189 Ill. 276, the words "absolutely and unqualifiedly," used in a will in connection with an estate in lands, were so qualified in meaning as to confer only the right to hold and enjoy an estate as a tenant for life or during the widowhood of the devisee.

The language employed in the clause in the will making the devise to the defendant in error does not in express terms purport to invest the defendant in error with the fee to the land on which the right of way is located. The express devise is of certain described tracts of land, "with the right of way from the highway near my house in section 22," etc. That which is so devised, aside from the specified tracts of land, is denominated "right of way"

merely, and this description would seem to refer to an easement rather than to the land itself. In the fourth clause of the will, which contains the devise to Cordelia Stevens, the grant of other lands to her is accompanied with a like provision securing to her the same right of way, and the word "absolutely" is used in the same connection with the devise to her as with that to the defendant in error. It is very clear it was not intended that these provisions with reference to the right of way should confer, absolutely and unconditionally, the title in fee simple thereto to each of these two different persons. The purpose of the testator is unmistakable. It was to provide for each of these devisees the means of ingress and egress to and from the public highway, over lands which he disposed of to the plaintiff in error by the fifth clause of his will. By the fifth clause in the will the plaintiff in error was invested with a qualified estate in the lands over and upon which the right of way in question existed, and also other lands abutting on the right of way on the north and south sides thereof, and still other lands situate to the east of the public highway. The gift to her was of the use, control and benefit, during her natural lifetime, of the real estate given to her. At the time of the making of the will, and before that, and from thenceforth during the lifetime of the testator, the "right of way" in question was maintained for the purpose of the convenient use and benefit of the lands situate west of the public highway, which included that devised to the plaintiff in error, and also the tracts devised to the defendant in error and to Mrs. Stevens. The end intended by the testator to be subserved by the "right of way" privileges given to the defendant in error and Mrs. Stevens by the will was not to invest in them the exclusive right, as against the plaintiff in error, to the use of the "right of way." The "right of way" was established, graded in places and supplied with a bridge and with a gate at its easterly terminus when the will was executed

and when the testator died, and the testator intended by his will to make it, as it then existed, available to all of his devisees. The right of way was and is essential to the proper and convenient "use. control and benefit" of certain of the tracts of land, the use, control and benefit whereof the testator gave to the plaintiff in error by his will. He intended that the easement, as it then existed, should be continued for the benefit of all the land which it beneficially affected. In such state of case, ought it be ruled that it became the duty of the plaintiff in error, at and after the death of the testator, to remove the gate closing the right of way at the public highway and to refrain from maintaining a gate there? Lands, the use and benefit whereof the will gave to the plaintiff in error, were used by the testator during his lifetime, and by the plaintiff in error subsequently, for purposes of grazing and pasturage. This gate served to keep cattle and other stock from straying from the pasture to the highway, and prevented animals from passing from the highway to the right of way and from thence to such pasture lands. The testator maintained a gate there for that and perhaps other reasons. The devise to the defendant in error did not expressly provide for an open way, but devised certain tracts of land with the right of way as it then existed. The grant or gift to the defendant in error was of a mode of ingress and egress afforded by the "right of way" as located and used by the testator. We are unable to assent to the view that the devise of the easement authorized the defendant in error to demand that the gate placed by the testator at the highway should be removed or that the plaintiff in error should not maintain a gate there thereafter.

In *Green* v. *Goff*, 153 Ill. 534, it was said in the opinion of the Appellate Court, which was adopted as the opinion of this court: "It has been uniformly held that the erection of gates or bars at the termini of a private way is not an unreasonable interference with the use of the

way. (*Maxwell* v. *McAtee*, 9 B. Mon. 20; *Whaley* v. *Jarrett*, 69 Wis. 613; *Short* v. *Devine*, 146 Mass. 119.) This is regarded as a reasonable rule, in view of the great advantage to the owner of the fee and the slight inconvenience to the owner of the way on account of the erection of such gates or bars."

The gift to the defendant in error not being, as we have seen, of a general open way but of a particular established and known way which was then closed at the public highway by a gate, he was not justified in breaking down and destroying such gate, but was required to open and close the same as he should find occasion to pass and re-pass through it. As to the principle here involved, see 19 Am. & Eng. Ency. of Law, 114; 4 Leading Cas. Am. Law of Real Prop. p. 218; *Brill* v. *Brill*, 15 N. E. Rep. (N. Y.) 538; *Short* v. *Devine*, 146 Mass. 119; Jones on Easements, secs. 405-407; Washburn on Easements, (2d ed.) p. 216. Our conclusion therefore is, the chancellor erred in finding the defendant in error was justified in breaking down the gate or removing the same.

It seems proper to remark that though the right of way in question is but an easement, and though plaintiff in error has mutual right with defendant in error to use the same for all the purposes of a "right of way," yet she has not the right to make other uses of it which are inconsistent with its character as a private way or "right of way." It cannot be lawfully used by her or her tenants as a cattle yard or place for feeding or keeping stock or farm animals. It is a way for ingress and egress for those entitled to use it, and cannot lawfully be devoted to purposes inconsistent with such use of it.

The decree, in so far as it declares the plaintiff in error may not lawfully maintain a gate at the easterly terminus of the right of way, is reversed and the cause is remanded for further proceedings in accordance with the views here expressed.

Reversed and remanded.

ELLA NORRIS *et al.*

v.

CHARLES DOWNING *et al.*

Opinion filed April 16, 1902.

1. APPEALS AND ERRORS—*effect where only one party appeals from decree.* If only one of the complainants in a cross-bill appeals from the decree dismissing such cross-bill, the assignment of errors must be treated as the assignment of errors by such party only, and if the decree is right as to such party it must be affirmed.

2. WILLS—*party taking under a will adopts all its provisions.* A party electing to accept the provision made for her in a will can not dispute another provision of the will devising certain real estate to another party, upon the ground that the testator was not the sole owner of the premises, but only a joint owner with his wife.

APPEAL from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

OWEN & OWEN, and OWEN T. REEVES, for appellants.

JOHN E. POLLOCK, and LOTT R. HERRICK, (SIG. LIVINGSTON, and EARL D. RIDDLE, of counsel,) for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

On December 29, 1866, Eli J. Everett conveyed to Jesse and Cynthia Downing, husband and wife, by warranty deed, the east half of the south-east quarter of section 33, township 22 north, range 5, east of the third principal meridian, McLean county, Illinois. On March 2, 1885, Jesse and Cynthia Downing executed and delivered to the Mutual Benefit Life Insurance Company of Newark, New Jersey, a mortgage on said premises to secure their promissory note for $1200, due five years after date, with interest at six per cent per annum, which note and mortgage were subsequently assigned and are now owned by Samuel Strock. Cynthia Downing died on February 15, 1888, and Jesse Downing on February 17,

1890. On November 8, 1893, Charles Downing executed and delivered to Charles J. Connor a mortgage on said premises to secure the payment of his promissory note for the sum of $1050, due five years after the date thereof, with interest at seven per cent per annum, payable semi-annually, which note and mortgage have also been assigned and are now owned by Samuel Strock. On January 1, 1898, Charles Downing executed and delivered to Frank Bishop a mortgage on said premises to secure the payment of his promissory note for the sum of $1000, due one year after date, with interest at seven per cent per annum. On July 26, 1899, Samuel Strock filed a bill in chancery in the circuit court of McLean county to foreclose the mortgage bearing date March 2, 1885, making the heirs-at-law of Jesse and Cynthia Downing, deceased, and Frank Bishop, parties defendant. Bishop answered, and filed a cross-bill to foreclose his mortgage. Strock answered the cross-bill of Bishop and set up the Connor mortgage, and asked that the same be foreclosed. The following heirs of Jesse and Cynthia Downing, deceased, viz.: John R. Downing, a son; Susan D. Smith, a daughter; Hiram Downing, a son; Oscar Kohler, a grand-son, the son of a deceased daughter; Ella Norris, a grand-daughter, the daughter of a deceased daughter, and John Downing, Mary D. Schilds, Claud G. Downing, Kirk Downing and Frankie Downing, the children of a deceased son, thereupon filed a cross-bill against Charles Downing, a son of Jesse and Cynthia Downing, deceased, Lucy Downing, Nora Downing, Thoda Downing and Albert Downing, the widow and children of Luther Downing, a deceased son of Jesse and Cynthia Downing, and Samuel Strock and Frank Bishop, averring that the said premises, at the time of the death of Cynthia Downing, deceased, were owned jointly by Jesse and Cynthia Downing; that Jesse Downing died testate, and that by his last will and testament he devised his interest in said premises to Charles Downing, his son, but that Cynthia

Downing died intestate, and that her interest in the said premises descended to her heirs as intestate property, subject to the mortgage thereon bearing date March 2, 1885; that the Connor and Bishop mortgages were liens, respectively, only upon the interest of Charles Downing in said premises as devisee of Jesse Downing, deceased, and heir of Cynthia Downing, deceased, and asked that the undivided one-half of said premises, and which had formerly belonged to Cynthia Downing, deceased, be partitioned between her heirs, subject to the mortgage of $1200 given thereon by Jesse and Cynthia Downing to the Mutual Benefit Life Insurance Company and sought to be foreclosed by the original bill filed by Samuel Strock, and that the Connor and Bishop mortgages be held to be liens, respectively, only upon the interest of Charles Downing in said premises. Charles Downing answered said cross-bill for partition, admitted the validity of the three mortgages; that they were due and unpaid and valid liens upon the premises, and claimed title to all of said premises in fee under the will of Jesse Downing, deceased, and as purchaser from Jesse Downing and Cynthia Downing.

Upon the final hearing the court entered a decree of foreclosure and sale of all of said mortgages, and held that Charles Downing was the owner in fee of said premises, subject to said mortgages, and that the other heirs of Jesse and Cynthia Downing, deceased, had no interest therein, and dismissed the cross-bill for partition for want of equity. No appeal was prayed from that part of the decree providing for the foreclosure of said mortgages and the sale of said premises to satisfy that part of the decree, but Ella Norris, one of the complainants in the cross-bill for partition, prayed an appeal from that part of the decree which dismissed the cross-bill for partition, and filed an appeal bond, signed by herself as principal and David Crumbaugh as surety, which appeal bond recites that "said Ella Norris, in behalf of herself

and the other complainants in said cross-bill for partition, has prayed for and obtained an appeal to the Supreme Court of this State," and the assignment of errors attached to the record filed in this court is made by "Ella Norris *et al.* appellants," and calls in question only the rulings of the trial court with reference to the matters involved in the hearing and dismissal, for want of equity, of the cross-bill for partition.

The only person complaining in this court of the action of the trial court in dismissing said cross-bill for partition is Ella Norris, as only parties to the suit who have appealed have a right to assign errors upon the record, and one appellant may not assign errors on behalf of a party who does not appeal. (2 Ency. of Pl. & Pr. 931; *Morse* v. *Smith*, 83 Ill. 396; *Beal* v. *Harrington*, 116 id. 113; *Howe* v. *South Park Comrs.* 119 id. 101; *Hammond* v. *People*, 164 id. 455.) If the complainants in the cross-bill for partition, other than Ella Norris, were dissatisfied with the ruling of the court in dismissing said cross-bill, they should have joined with her in praying and perfecting an appeal or should have obtained a severance and perfected an appeal. (*Hileman* v. *Beale*, 115 Ill. 355.) In speaking of section 70 of the Practice act, in *Hammond* v. *People*, *supra*, we say (p. 457): "This section and the practice recognized allow one party to use the names of all as plaintiffs in suing out a writ of error, but the right 'to use the names of all said persons, if necessary,' does not, in the opinion of the court, enable one party to appeal in behalf of all. Each appellant must for himself file bond, or there must be a joint appeal and bond or a several appeal by the appellants." As the cross-complainants, other than Ella Norris, neither prayed an appeal nor signed an appeal bond, they have no appeal pending in this court, and as they have not appealed they cannot assign errors, as appellants, upon the record, neither can Ella Norris assign errors on their behalf. The assignment of errors will therefore be treated only as an assign-

ment of errors by Ella Norris, and if the cross-bill for partition was rightfully dismissed as to her, as we think it was, the decree must be affirmed.

On the second of March, 1885, Jesse Downing made a last will and testament, by the terms of which, after giving his son John $10, his son Washington $10, his son Hiram $10, his daughter Susan $10, the heirs of his deceased daughter Mary $10, and his son Luther $5, by the seventh clause thereof he provided: "I give, devise and bequeath to Ella Norris, daughter of Olive Norris, deceased, all my household goods and kitchen furniture and other personal property not otherwise disposed of in this will;" and by the ninth clause thereof: "I hereby give, devise and bequeath to my son Charles Downing the east half of the south-east quarter of section 33, township 22, north, range 5, east of the third principal meridian, McLean county, Illinois,"—which will was duly admitted to probate, and Charles Downing, the executor therein named, duly qualified, and on July 6, 1893, all the household goods and kitchen furniture left by Jesse Downing, deceased, were turned over by said executor to said Ella Norris and received by her in full of said legacy and bequest. Ella Norris, having accepted the provision made for her by her grandfather, Jesse Downing, deceased, by his last will and testament, thereby adopted all of the provisions contained in said will, and cannot now be heard to say that Charles Downing did not take title by virtue of said will to the premises in controversy. *Buchanan* v. *McLennan*, 192 Ill. 480; *Kidder* v. *Douglas*, 194 id. 388.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

THE CHICAGO TITLE AND TRUST COMPANY

v.

JOSEPH BRUGGER.

Opinion filed April 16, 1902.

1. MORTGAGES—*effect where a trustee fraudulently transfers note and trust deed.* Where a trustee, having no title to a trust deed and note, fraudulently transfers them to a trust company as collateral security, it devolves upon the trust company to show that it took the paper in good faith, without notice, for value and before maturity and in the usual course of business.

2. SAME—*when purchaser of trust deed and note is charged with notice.* Where a note and trust deed bear endorsements showing that another person than the trustee is the legal holder of the note, a purchaser from the trustee, who relies upon his explanation of the endorsement instead of making inquiry as to the ownership of the note, is not entitled to protection as against the legal holder of the note, whom the trustee has defrauded in making the sale.

Chicago Title and Trust Co. v. *Brugger*, 95 Ill. App. 405, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

The Chicago Title and Trust Company filed in the superior court of Cook county its bill to foreclose a trust deed to Theodore H. Schintz, trustee, dated November 1, 1893, executed by Johann Gebhardt Gmeiner and wife. Gmeiner and wife made no defense and were defaulted, but appellee, Joseph Brugger, who was made a defendant, appeared, and by answer and cross-bill claimed to be the owner of the trust deed and the notes secured thereby.

There is no controversy as to the facts. The evidence shows that Brugger was the owner of the promissory note, which was dated November 1, 1893, payable two years after date to the order of the maker, with interest at seven per cent, and secured by trust deed on real es-

tate in Chicago. The note was endorsed in blank by the maker. On the 14th of June, 1895, an extension agreement signed by Gmeiner and wife only, extending the time of payment three years from November 1, 1895, was made and attached to the note. This agreement was not signed by the owner of the note. This note and agreement were left by Brugger with Schintz to collect the interest, when due, and for no other purpose whatever. Schintz being indebted to the appellant, on July 12, 1897, delivered this note and trust deed to the trust company as collateral. At the time they were delivered to the trust company there was endorsed on both the trust deed and the note the following: "Lots 33 and 34, described within, released by release deed dated June 12, 1895, by order of Joseph Brugger, holder of note secured by this trust deed.—Theodore H. Schintz, trustee." Niblack, the officer of the trust company who accepted these collaterals from Schintz, upon seeing this endorsement asked what it meant; why it had been made; how much security was left, etc. He testified: "I looked at the endorsement and read it, and I said, 'Hello, what is this? Some of this security has been released. Here are two lots gone; and what about this business? It seems to belong to somebody else.'" Schintz answered that he was the owner of the principal note and trust deed; that it was a loan which he had once sold and that he had taken it back and renewed it; that the security was ample, and that he would sell it again. The trust company, upon this statement and the reputable business standing of Schintz, made no further inquiry. Some weeks after the trust company came into possession of the Gmeiner papers Schintz failed in business. The indebtedness to the bank was unpaid, and the trust company, obliged to resort to its collateral security, filed its bill to foreclose the Gmeiner trust deed. The superior court decreed a foreclosure in favor of appellee, Brugger, and dismissed appellant's bill for want of equity, which decree was by the Appellate Court af-

firmed, from which the appeal is here brought by the appellant.

PADDOCK & BILLINGS, for plaintiff in error.

RUBENS, DUPUY & FISCHER, for defendant in error.

Mr. JUSTICE RICKS delivered the opinion of the court:

It is conceded in this case that Schintz had no title to the note and trust deed and that he fraudulently transferred the same to the trust company. Such being the case, it rested upon the trust company to show that it took the paper in good faith, without notice, for value, before maturity and in the usual course of business. (*Hide and Leather Bank* v. *Alexander*, 184 Ill. 416.) There was an endorsement on the note and trust deed in unmistakable terms, and by Schintz as a trustee, that Brugger was the legal holder of the note. The purport of this endorsement was so plain that it immediately put the trust company upon inquiry. Having reposed confidence in the veracity of Schintz the trust company failed to make any other inquiry, and therefore empowered Schintz to wrong either itself or others. Mr. Lemon, vice-president and general manager of the trust company, testified that had he seen this endorsement it would of itself have led to inquiry. Mr. Niblack, representing the trust company in this transaction, did see this endorsement and immediately asked Schintz what it meant. Schintz's reply being satisfactory to the trust company, it took no further steps. Here the paper having on its face such endorsements as would lead any intending purchaser to inquiry, and the legal owner of the note having the right to rely upon this endorsement, and the trust company blindly placing its confidence in Schintz, it should sustain whatever loss the agreement or fraudulent acts of Schintz caused. When appellant, thus charged with notice of Brugger's ownership, chose

to disregard the notice and to rely upon the representation of Schintz, it did so at its own peril, and it cannot now throw upon Brugger the consequence of its having thus confided in Schintz's assurances. A person charged with notice who takes unmatured paper takes it subject to all the equities which reasonable inquiry by the taker, arising from such notice, would develop. Had the trust company made any inquiry of any of the parties to the note it would at once have discovered that Brugger was the true holder of the note. Being thus charged with notice it is immaterial whether or not the purported extension was binding upon Brugger.

The judgment of the Appellate Court is correct and is affirmed.

Judgment affirmed.

THOMAS McSORLEY

v.

FRED SCHROEDER.

Opinion filed April 16, 1902.

1. ELECTIONS—*section 12 of Ballot act of 1891 is the only provision relating to pasters.* Section 12 of the Ballot law of 1891, providing that the election officer having charge of the ballots may place the name of a candidate supplied to fill a vacancy, in certain contingencies, upon the ballot by affixing a paster or by writing or stamping before the ballot is delivered to the voter, is the only provision of the act concerning pasters.

2. SAME—*method of voting for candidate whose name is not on ticket.* Under section 23 of the Ballot act of 1891, if a voter desires to vote for a person whose name is not on the ticket he may write the name of the candidate of his choice in a blank space on the ticket and make a cross opposite thereto, but he has no right to substitute for such method the pasting of a slip of paper, containing the name of his candidate over the name of some other candidate.

3. SAME—*effect where voter pastes name of candidate over another name.* Ballots prepared by voters by pasting a slip of paper, with a name printed thereon, over the name of a candidate printed on the ticket, are invalid, and cannot be counted for any candidate on the ballot.

APPEAL from the Circuit Court of Iroquois county; the Hon. R. W. HILSCHER, Judge, presiding.

This is a petition, filed on May 16, 1901, in the circuit court of Iroquois county by appellee to contest the election of appellant to the office of president of the board of trustees of the village of Martinton. At the June term, 1901, a hearing was had upon the issues made by the petition, answer and replication. The original ballots, poll-books and tally-sheets were produced, and the ballots were re-counted by the court. A decree was rendered on July 3, 1901, finding that appellee had received a majority of the legal votes cast, and declaring that he was lawfully elected to the office named. The present appeal is prosecuted by the appellant from the decree so entered by the circuit court.

The facts, which are undisputed, are substantially as follows: The village of Martinton is organized under the general law for the incorporation of cities and villages. It held its annual election for village officers on April 16, 1901. Prior to the latter date there were nominated at a caucus in the village the following persons, who were regularly certified to the clerk of said village, to-wit: Thomas McSorley as president of the board; John LeSage for treasurer; V. A. Hathway for clerk; and Henry Shannon, S. W. Peebles and A. C. Behlke as trustees for said village. There was also a petition filed with the clerk, on which the appellee was petitioned to run as president of the board. The official ballot, printed under the direction of the village clerk, was the usual form of Australian ballot and contained the names of appellant and his associates, together with the title of the respective offices for which they were candidates, in a column headed by the appellation or title of "Union Ticket." The name of appellee appears upon the ballot, as a candidate for president, in another column, headed by the words "Petition Ticket," there being no other candidates named un-

der the title of "Petition Ticket." The persons above named were the only candidates nominated by caucus or petition, whose names appear upon the ballot as originally prepared under the direction of the clerk. The following is a sample of the ballot, as originally prepared for the use of the voters, to-wit:

Union Ticket.

President,
THOMAS McSORLEY.

Treasurer,
JOHN LeSAGE.

Clerk,
V. A. HATHWAY.

Trustees,
HENRY SHANNON.
S. W. PEEBLES.
A. C. BEHLKE.

Petition Ticket.

President,
FRED SCHROEDER.

In addition to the above, there were printed upon the said ticket, beneath the names of the candidates, the words, "Shall the property tax be paid in money?" with the words "Yes" and "No" following them, and two blank squares to the right of the words "Yes" and "No" printed under each other, for the submission of that question to the voters. The official endorsement was printed on this ticket, and it was the only ticket that was delivered by the judges to the voters to vote. It is conceded that the election was regularly held and conducted by the officers thereof, and that all the formalities of the law were observed in the preservation of the poll-books, tally-sheets and ballots. The judges of election, upon the count made

by them, found that appellant had been elected president of the board of trustees of the village. The board, upon a canvass of the returns, also found that appellant had been elected, and he thereupon qualified and assumed the duties of the office. On the day of election there was a bundle of stickers or pasters on the table where the judges sat to distribute the ballots. These stickers or pasters consisted of small yellow slips of paper with adhesive material on one side, and with the name of "Stephen Bunker" printed on the other side. Only two of these stickers or pasters were taken from the table by the voters. Such stickers as were used were pasted on the tickets in the booth by the voters themselves. There was but one election precinct in the village.

Eighty-three ballots were cast at said election. One of these ballots had a cross in the circle at the top of the column, headed "Union Ticket," in which appellant's name appeared, and also a cross in the square opposite the name of appellee in the column headed "Petition Ticket," and also three pencil-marks drawn lengthwise across the name of Thomas McSorley. The circuit court held that this ballot was not a vote for either party and should not be counted. Of the remaining eighty-two votes, forty-one were cast for Thomas McSorley, and forty-one for Fred Schroeder, as president of the board of trustees. Twenty-one ballots had a cross in the circle to the left of the words "Union Ticket" in the column, in which appellant's name appeared, and contained no other mark made by the voters. These ballots were counted for the appellant, and there is no dispute as to their having been so counted correctly. Thirty-one ballots had a cross in the circle to the left of the words "Petition Ticket" in the column, in which appellee's name appeared, and contained no other mark made by the voters. These ballots were counted for the appellee as president of the board, and it is not denied that they were so counted correctly.

Of the forty-one votes cast for McSorley twenty had yellow printed stickers, such as are above described, pasted over the name of one of the candidates for trustee as said ballots were originally printed, and containing the name of "Stephen Bunker," all of the pasters or stickers not being pasted over the name of the same candidate for trustee, but in some instances over the name of one of said original candidates for trustee, and, in the case of other ballots, over the name of some other of said original candidates for trustee. There was no cross in the square to the left of the yellow sticker so pasted over the name of one of the trustees. Besides the pasters above described, these twenty ballots had a cross in the circle to the left of the words "Union Ticket" in the column, in which the name of appellant appeared. The cross and the sticker were the only marks made by the voters, which appeared upon these ballots. Of the forty-one votes that were cast for Schroeder, ten of the ballots had a cross in the circle to the left of the words "Petition Ticket" in the column, in which appellee's name appeared, and the same kind of yellow stickers or pasters pasted on in the same way as those on the McSorley ticket, that is to say, they contained the printed name of "Stephen Bunker" pasted over the name of one of the original candidates for trustee, as said ballots were originally printed.

The circuit court did not count any of the ballots containing the yellow stickers or pasters as aforesaid. In counting the remainder of the ballots, the court held that McSorley had only received twenty-one votes and Fred Schroeder thirty-one votes at said election, and therefore declared Fred Schroeder elected, and entered a decree accordingly.

W. E. Lewis, and Morris & Hooper, for appellant.

Doyle & Crangle, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—Did the circuit court err in refusing to count the ballots, on which the stickers or pasters were pasted by the voters?

Section 26 of the Ballot law of June 22, 1891, provides that, "if the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. No ballot without the official endorsement shall be allowed to be deposited in the ballot-box, and none but ballots provided in accordance with the provisions of this act shall be counted." (2 Starr & Cur. Ann. Stat.—2d ed.—p. 1690.) The ballots, upon which these stickers were pasted, were not the ballots prepared by the clerk who was authorized to prepare them. They were certainly not ballots provided in accordance with the provisions of the act of 1891. The only provision of the statute, which authorizes the use of pasters, is found in section 12 of the act. (Ibid. p. 1684). By that section "it is made the duty of the election officer, having charge of the ballots, to place the name of a candidate supplied to fill a vacancy, in certain contingencies, upon the ballot by affixing a paster, or by writing or stamping, before the ballot is delivered to the voter." (*Roberts* v. *Quest*, 173 Ill. 427). In the case at bar, there was no such vacancy as is contemplated by section 12. Even under the terms of that section, the paster can only be used "when furnished as a part of the official ballot by the proper officer, when a vacancy has happened after the ballots have been printed." (Ibid). Here, no official ballots were furnished to the voters by the proper officer with pasters upon them, but the pasters were placed upon the ballots by the voters after they entered the voting booth.

In *Fletcher* v. *Wall*, 172 Ill. 427, we held that the insertion of the names of candidates, not printed on the offi-

cial ballot, by attaching to the ballot tickets or slips of paper, on which such names are printed, is unlawful, and is not authorized by section 23 of the Election law of 1891. Section 23 provides that "on receipt of his ballot the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting booths so provided and shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto." In *Sanner* v. *Patton*, 155 Ill. 553, we held that "section 23, which points out the mode or manner of voting, after the voter receives the ballot, clearly confers upon the voter the power to insert in the ballot the name or names of such person or persons as he may desire to vote for for any office to be filled at the election, and vote for such persons. * * * He may write the name of a candidate on the ballot and place a cross opposite the name, and the ballot shall be counted for such person." (Ibid. p. 562).

In the case at bar, if any voter, who placed a yellow paster over the name of one of the trustees upon the official ballot, had desired to vote for Stephen Bunker, instead of one of the trustees, whose names were thereon printed, he had, under the statute, the privilege of writing the name of "Stephen Bunker" on the ballot and placing a cross opposite the name. Such was the mode of voting for a trustee, whose name was not on the official ballot, as prescribed by the statute. We have said "that it is the duty of every voter, under this law, to ascertain and follow the provisions of the statute and the directions of the Secretary of State in his instructions sent out with the ballots, and that whenever, either through negligence or willfulness, he disregards that duty, he does so at the peril of losing his vote." (*Parker* v. *Orr*, 158 Ill. 609).

The voter has no right to substitute the pasting of a new name over the name on the official ballot for the writing of the new name thereon and the placing of a cross opposite the new name, as directed by the statute. In *Fletcher* v. *Wall*, *supra*, after referring to the provision of the statute requiring booths to be furnished, and "shelves, pens, pen-holders, ink, blotters and pencils" also to be furnished to enable the voter to prepare his ballot, we said: "The mere fact the methods thus provided may be less convenient than the use of pasters or stickers furnishes no sufficient reason for changing or modifying the requirement of the law, wisely designed for the purposes above mentioned. The inconvenience here would have been no greater than in any other case where the voter writes the name of a candidate on the ballot." It does not follow that, because, under the provisions of section 23, the voter may prepare his ballot by writing the name of the candidate of his choice in a blank space on the said ticket, he may also indicate his choice by pasting a printed name on the ticket. Such pasting of the name does not come within the meaning of the words, "writing in the name of the candidate of his choice in a blank space on said ticket." (*Fletcher* v. *Wall*, *supra*).

In *Roberts* v. *Quest*, *supra*, we held that, under the Election law of 1891, a voter has no authority to insert the name of the candidate of his choice on the official ballot by using a paster, on which the name of such candidate is printed; and we there said: "It is, however, plainly prescribed by the statute that the ballot, furnished by the judges to the voter, must be prepared by him individually, after he enters the booth, except in so far as he may be assisted as an illiterate voter, under the provisions of section 24, and that he shall be allowed to do so uninfluenced or in any way controlled by being electioneered or furnished with tickets or pasters by outsiders. * * * It is manifest that, if pasters may be resorted to by one candidate, they may be by all, and the

official ballot might become but little more than a convenient card upon which to paste private tickets printed and circulated in secret. The use of such tickets would revive the evils sought to be guarded against by the Ballot law."

It is claimed, however, on the part of appellant, that the rule, which thus forbids the use of pasters, merely holds that the ballot containing a paster cannot be counted for the candidate in whose favor the paster is used, that is to say, that a ballot containing a paster can not be counted for the candidate named on such paster, but that, as to other candidates upon the same ballot for whom pasters have not been used, the ballot of the voter is to be counted. In the present case, it is said that, inasmuch as the pasters were placed over the name of a candidate for trustee, and not over the name of a candidate for president of the board, the vote should not be counted as a vote for such trustee, but that the voter is entitled to have it counted as a vote for the president of the board.

The trouble with the contention of the appellant is that the sticker or paster, as used upon the ballot, made the whole ballot invalid because it was not, by reason of such pasting, such a ballot as was provided for by the law; nor was it such a ballot as was prepared by the clerk who was authorized to prepare the ballots.

We are of the opinion that the circuit court properly rejected the ballots containing the pasters as above described.

Second—One of the ballots, rejected by the court below and not counted, as not having been cast for either party, had a cross in the circle at the top of the column headed "Union Ticket," in which appellant's name appeared, and a cross in the square opposite the name of appellee in the column headed "Petition Ticket," and also had three lead-pencil marks, drawn lengthwise across the name of the appellant in the column headed "Union Ticket." It

is not necessary to consider the question whether the circuit court did or did not err in refusing to allow this ballot to be counted, as, without counting it, the appellee had a majority of the ballots after the rejection of all the ballots containing pasters.

For the reasons above stated, the decree of the circuit court, declaring the appellee to have been elected president of the board of trustees, was correct, and is affirmed.

Decree affirmed.

IDA E. SCHMIDT

v.

GEORGE M. SHAVER *et al.*

Opinion filed April 16, 1902.

1. GUARDIAN AND WARD—*at common law, guardian could sell personal property of ward without order of court.* At common law a guardian had power to sell the personal property of his ward without an order of court, and although he was liable on his bond for an abuse of power, the purchaser, with no notice of the guardian's fraud, would take good title.

2. SAME—*common law powers of guardian, not inconsistent with statute, still exist.* So far as our statutes prescribe the powers and duties of guardians they supersede the common law, but the common law powers of guardians still exist when consistent with statute.

3. SAME—*right of probate court to order the sale of minor's judgment.* If it is shown to the probate court by a guardian that a judgment in favor of his ward cannot be collected at that time and that the ward is in pressing need of funds, the court may order the guardian to sell the judgment for a price which it finds to be a good one.

4. PRINCIPAL AND AGENT—*party affirming existence of relation of agency has burden of proof.* If a guardian, authorized by order of court to sell a judgment in favor of his ward, makes out an assignment thereof which he delivers to a third party for safe keeping, a purchaser of the judgment from such third party has the burden of proving that he was the agent of the guardian and authorized to make delivery and receive payment.

5. SAME—*when purchaser is bound to ascertain authority of an agent.* One having notice that the party having possession of an assignment of a judgment is not the owner of the judgment nor entitled

to the proceeds, but that they belong to a guardian, is bound to ascertain what authority such party has to make delivery and receive payment as the agent of the guardian.

6. SAME—*mere fact that party assumes to act as agent does not prove agency.* The mere fact that the party to whom a guardian delivered an assignment of his ward's judgment for safe keeping assumes to act as agent of the guardian in delivering the assignment and receiving the proceeds therefor, which he appropriated, does not establish the fact of his agency, in the absence of proof of his appointment or that the guardian ratified his acts or held him out as agent, and neither the purchaser nor his assigns can hold title to the judgment as against the ward.

7. JUDGMENTS AND DECREES—*filing assignment of a judgment with clerk is not notice.* The filing of assignments of a judgment with the clerk of the court is not constructive notice to any one, since not required to be recorded and not considered public records.

8. SAME—*assignment of a judgment transfers only an equitable title.* A judgment for damages for personal injuries cannot be assigned so as to transfer more than an equitable title thereto.

Schmidt v. *McBean*, 98 Ill. App. 421, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

DEFREES, BRACE & RITTER, for appellant:

The guardian had no power to sell the judgment and the probate court had no power to authorize sale thereof. Starr & Curt. Stat. chap. 64, sec. 17; *Hayes* v. *Insurance Co.* 125 Ill. 626.

The authority given by the statute to compound a debt does not include the power to sell it. 6 Am. & Eng. Ency. of Law, (2d ed.) 377; 2 Freeman on Judgments, sec. 430; *Union Trust Co.* v. *Rigdon*, 93 Ill. 458.

If the guardian had power to sell and assign the judgment, still the assignment under which the defendants claim has no validity because it was never delivered. The negligence, if any, of the guardian cannot be imputed to the complainant. *Railway Co.* v. *Wilcox*, 138 Ill. 370; *Daube* v. *Tennison*, 154 id. 210.

A judgment is not negotiable. The assignee takes a mere equitable title, and a subsequent assignee takes no better title. *Hughes* v. *Trahern*, 64 Ill. 48; *Yarnell* v. *Brown*, 170 id. 362; *Dobbins* v. *Cruger*, 108 id. 188.

Even if the judgment were negotiable, proof of the circumstances under which the assignment was made would have thrown upon the defendants the burden of proving that the purchaser took the assignment in good faith, for value, and without notice of the alleged agent's want of authority to deliver the paper and receive the proceeds. *Wright* v. *Brosseau*, 73 Ill. 381; *Charles* v. *Remick*, 156 id. 327; *Hodson* v. *Eugene Glass Co.* 156 id. 397; *Bank* v. *Alexander*, 184 id. 416; 82 Ill. App. 484.

If the equities are evenly balanced the legal title of the complainant must prevail. 1 Beach's Eq. Jur. sec. 11.

The filing of the assignment with the clerk, and his memorandum thereof on the judgment docket, was not constructive notice to complainant that the assignment had been made. *Railway Co.* v. *Blanchard*, 37 Ill. App. 391.

GEORGE SAWIN, for appellees:

No doubt is entertained of the competency of a guardian's power over the disposition of the personal estate as between him and a *bona fide* purchaser, unless restrained by statute. Although the guardian is liable on his bond for any abuse of this power, yet the vendee takes a good title if he has no notice of the guardian's fraud. *Wallace* v. *Holmes*, 9 Blatchf. 65; Woerner on Am. Law of Guardianship, sec. 54, p. 179; *Field* v. *Schieffelin*, 7 Johns. Ch. 150; *Woodward* v. *Donally*, 27 Ala. 198; *Fountain* v. *Anderson*, 33 Ga. 372; *Bank of Virginia* v. *Craig*, 6 Leigh, 399.

The guardian's power to sell the ward's personal estate without first obtaining a license therefor,—*i. e.*, an order of court,—includes the power to sell a note or debt belonging to the ward as well as a mortgage securing the same. Woerner on Am. Law of Guardianship, sec. 54, p. 179, and case cited; *Humphrey* v. *Buisson*, 19 Minn. 221.

A guardian, under our statutes, has the power, under approbation and direction of the county court, to compound or compromise in respect to his ward's rights. For the personal discretion of the guardian there was substituted the judicial determination of an established court. *Hayes* v. *Insurance Co.* 125 Ill. 635.

A guardian may dispose of the personal estate of his ward as he may think most beneficial to the ward, and the person who buys from or through the guardian in good faith, with no knowledge of any fraudulent intent on the part of the guardian, is not responsible for the application of the money. 7 Johns. 150; 27 Ala. 198.

A purchaser buying at a judicial sale has only to look to the jurisdiction of the court and to the decree. *Fitzgibbons* v. *Lake*, 29 Ill. 176.

Although a guardian may have misappropriated funds derived from his ward's estate and been faithless to his trust, an innocent purchaser will be protected. *Mulford* v. *Stalzenback*, 46 Ill. 302.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On December 11, 1894, appellant, Ida E. Schmidt, who was then a minor, suing by James W. Hurdle, her next friend, recovered a judgment against the city of Chicago, one of the appellees, for $5000 damages for a personal injury. The suit was prosecuted by the People's Casualty Claim Adjustment Company, a corporation, under a contract with the parents of appellant by which the corporation was to receive for its services one-fourth of the amount collected in case of settlement and one-third in case of suit. Charles W. Beck was president and manager of the corporation, and shortly before the rendition of the judgment, at his suggestion and procurement, George M. Shaver, one of the appellees, was appointed guardian of the appellant by the probate court of Cook county. Afterward there were negotiations for the sale

of the judgment to Amos H. Perkins, whom one Holmes seems to have found as a purchaser at $4375. Beck had spoken to Shaver, the guardian, about selling the judgment, and obtained an order of the probate court March 4, 1895, for its sale through an attorney of the corporation. This order recited that Shaver, the guardian, had presented his petition, and it appeared to the court that there was no favorable prospect of the payment of the judgment at an early day; that the parents of the minor were poor and unable to properly care for her; that petitioner had received an offer of $4375, which was a good one under the circumstances, and that the minor was in need of immediate medical and surgical attention and in need of money. It was therefore ordered that the petitioner, as guardian, have leave to compound and sell the judgment for not less than $4375. Beck called on Shaver the same day and told him he had arranged a meeting with the purchaser, and they went to the office of Holmes, where Shaver signed and acknowledged, in duplicate, an assignment of the judgment to Perkins. Shaver and Beck and a clerk from Holmes' office then went to the Northern Trust Company Bank and left the assignment with the cashier, informing him that it was arranged for Perkins to come in in the course of a day or two and pay the amount, and the cashier was directed to deliver the assignment to Perkins upon payment and to pay the proceeds to Shaver, the guardian. After several days Shaver and Beck went to the bank and found the money had not been paid, and the cashier re-delivered the assignment to Shaver. Beck and Shaver then went to the office of the corporation, and Beck suggested that possibly Perkins might have difficulty in getting the money and would later carry out the deal. Holmes had gone to New York, and Beck said that he would see him in the course of a few days on his return and would let Shaver know if the deal would be consummated. Shaver had some papers for safe keeping in the vault of the corpo-

ration in cases where he was administrator or guardian, but had no private box there. He concluded to leave the assignment in the vault, and called a young woman, who was stenographer and book-keeper in the office, and handed the assignment to her to be placed in the vault. She put the papers in an envelope and put them in the vault of the corporation. Shaver never heard anything more about the proposed sale or the prospective purchaser. About eight months afterward he inquired of Beck about the prospect of selling the judgment, and he said there was no immediate prospect of a sale, although he had, in fact, sold it and received the money. About March 23, 1895, Beck delivered the assignment left in the vault of the corporation to Perkins, and received in payment from Perkins a check of the Western Paving and Supply Company, of which Perkins was an officer, given at his request, payable to the order of C. W. Beck, for $1375, which was endorsed by Beck and was paid on March 25, 1895. On May 10, 1895, Perkins assigned the judgment to Duncan S. McBean. On May 17, 1895, McBean assigned it to the Commercial National Bank of Chicago. On September 20, 1895, the Commercial National Bank re-assigned it to McBean. On May 18, 1897, McBean assigned the judgment to James H. Pearson, one of the appellees. Each of the assignments was filed with the clerk of the court where the judgment was rendered. Neither Shaver nor appellant knew anything of the delivery of the assignment and there was no report of the sale to the probate court. The proceeds were never received by Shaver nor accounted for in any way. Appellant became eighteen years of age July 10, 1897, and she and her mother began to make inquiries about the judgment. On July 13, 1897, Beck wrote to appellant's mother that it would be some time before they could get the money; that it was not yet on the appropriation, and would probably be put on the appropriation next year and then paid after that. On August 11, 1897,

the probate court entered an order reciting that Shaver had presented his report showing that the estate of the minor consisted of said judgment, which remained unpaid, and it appeared to the court that no sale had been made under the order of March 4, 1895, authorizing the sale of the judgment. The order authorizing the sale of the judgment was vacated and set aside and leave given the guardian to assign and transfer the judgment to his ward. On August 12, 1897, Shaver, as guardian, executed an assignment of the judgment to appellant, and an order was entered reciting such assignment and Shaver was discharged as guardian. Beck delivered the assignment to appellant and told her the judgment would be paid in about two years; that it had not been paid sooner because it had to go according to its turn, and advised her to keep the assignment in a safe place. She put it under her carpet, and saw Beck afterward, when he told her the judgment had not been paid and she would have to wait. On February 8, 1899, Beck wrote to appellant's mother that he would look up the judgment and see when it would be paid. On February 20, 1899, he wrote appellant that he had not been able to find out the exact status of the judgment and when the city would pay it, but would write her as soon as he had found out; that he had found there had been several transfers and was quite surprised, and when he found out when the judgment would be paid he would take steps to enforce its payment to her. The city had been paying interest on the judgment to the several assignees, the last payment being January 27, 1899. About the time of this last letter appellant first discovered the facts, and she filed the bill in this case for the purpose of setting aside and vacating the assignment to Perkins and the subsequent assignments to the parties claiming through him. McBean had died and his executors were defendants, and Perkins died while the suit was pending. The foregoing facts were proved on the hearing in the supe-

rior court, and complainant's bill was dismissed for want of equity.

It is first contended on the part of appellant that her guardian had no power to sell the judgment and that the probate court had no power to authorize or direct a sale. At common law a guardian had power to sell the personal property of his ward without an order of the court, and although he was liable on his bond for an abuse of the power, the vendee, with no notice of the guardian's fraud, would take a good title. (15 Am. & Eng. Ency. of Law,—2d ed.—p. 56.) So far as our statutes prescribe the powers and duties of guardians, they supersede the common law. (*Hayes* v. *Massachusetts Mutual Life Ins. Co.* 125 Ill. 626.) But the common law powers of guardians still exist, where not inconsistent with the statute. (*Bond* v. *Lockwood*, 33 Ill. 212.) The proposed sale of the judgment in this case was not within the terms of any statute, and the guardian would undoubtedly have had the power to dispose of it at its face value, which would have been equivalent to collecting and receiving the whole amount of the demand, without any order of the court. The judgment could not be collected at the time, and the court, which had general supervision of the guardian, found that the price offered was a good one under the circumstances. We think the probate court had a right to authorize the sale of the judgment at what it found to be its actual value. The guardian, however, never carried out the order of the probate court and never delivered the assignment to Perkins, unless Beck was his agent to make the delivery. The rights of Perkins and the subsequent assignees must depend upon establishing an agency in Beck to make the delivery and receive the payment. Upon that question, the burden of proof was upon the defendants, who affirmed the existence of the relation of principal and agent between the guardian and Beck.

There is no presumption of Beck's authority, and one who claims the benefit of a contract made through an

agent has the burden of proof when the alleged agency is denied. In order to prove the agency, the defendants were bound to prove an appointment, either express or implied from the circumstances, or that the guardian held Beck out as his agent with authority to make the delivery and receive the payment. Perkins had notice that Beck was not the owner of the judgment and was not entitled to the proceeds, but that they belonged to the guardian, and that Beck could only receive them as agent for the guardian, and it was therefore incumbent on him to ascertain what Beck's authority was. The guardian never authorized Beck to deliver the assignment or receive payment, and never knew of the act until it was discovered after his discharge, shortly before this suit was begun. The filing of the assignments with the clerk of the court did not operate as constructive notice to the guardian or appellant. They were not required to be recorded and were not contemplated by the statute as public records, and would not amount to constructive notice to any one. (Wade on Law of Notice, sec. 119; *Bourland* v. *County of Peoria*, 16 Ill. 538; *Betser* v. *Rankin*, 77 id. 289.) The guardian never received any part of the proceeds and never ratified the sale or the act of Beck in any manner. The mere fact that Beck assumed to act as agent in delivering the assignment and receiving the payment, without the knowledge or subsequent ratification of the guardian, was not sufficient to prove the agency. It is beyond question that the guardian never held Beck out as having authority to receive payment, unless it was by the single act of leaving the assignment for safe keeping in the vault of a corporation of which Beck was the manager, and the only reason Perkins had for assuming that Beck was the agent of the guardian was that he had possession of the assignment. Beck was not an attorney or broker, and the sale of judgments was not within the scope of the usual business carried on by him, from which an inference of authority might arise. It is true, that

where a person has possession of a promissory note which is due and payable, it may be inferred that he has authority to receive payment of it. (*Stiger* v. *Bent*, 111 Ill. 328.) But authority to receive payment cannot be inferred from possession when the paper is not due. (*Fortune* v. *Stockton*, 182 Ill. 454.) And the mere possession of personal property does not generally authorize an inference of power, as agent, to sell it and receive the proceeds. So far as appears, Perkins made no inquiry as to Beck's authority, but from the mere possession of the paper dealt with him and paid with a check payable to the order of Beck. He thereby put it in the power of Beck to misapply the proceeds and defraud the guardian. He might have protected himself by inquiry or by making the check payable to the order of the guardian. There was no previous course of dealing recognized or acquiesced in by the guardian from which authority could be inferred and no other relation out of which an agency ordinarily arises, and we cannot regard the alleged agency proved by the mere fact that Beck had possession of the assignment.

Neither was there any evidence that the guardian held Beck out as his agent with authority to make the delivery and receive the proceeds. Where one party holds another out as his agent with authority to do an act, he is bound by the act of the agent on the ground of estoppel. The guardian left the assignment with the corporation merely for safe keeping, and Beck possessed himself of it wrongfully, and delivered it in fraud of the rights of the guardian and appellant. Beck knew that he had no authority to deliver the assignment, as is clearly shown by his conduct. He told the guardian, eight months after he had received the proceeds, that there was no prospect of selling the judgment, and kept informing appellant and her mother that the judgment would probably be paid to them some time in the future. The transaction by Beck was fraudulent, and it was essential for defendants to

show that Perkins believed in the existence of, and relied upon, the agency and authority of Beck, and that he had no notice of the fraud. It was agreed by counsel that Pearson would testify that he purchased the judgment from McBean in good faith and for value and with no knowledge of any defect in McBean's title, and that he was advised of the state of the record. There was no evidence on the same questions as to Perkins, the only evidence being that he gave the check payable to the order of Beck and received the assignment. The equities of the case are with the appellant, and if Perkins did not get title to the judgment, those claiming through him obtained none. The judgment was not assignable, and all that could be transferred was an equitable title. (*Hughes* v. *Trahern*, 64 Ill. 48.) The alleged agency of Beck for the guardian was not proved. There was no express appointment or authority conferred or intended to be conferred. There was no previous course of dealing, relation of the parties, usual employment, or other circumstance from which an appointment could be fairly implied. The guardian did nothing which ought to estop him as having held out Beck as his agent.

Appellant has a right to have the assignments set aside and to collect her judgment. Neither Beck nor the People's Casualty Claim Adjustment Company is a party to this suit, and any right of Pearson or other assignee of the judgment, as against them or either of them, to any part of the proceeds of the judgment when collected, will not be affected by the decree. If there are any equities between them, they may be enforced in some other proceeding.

The judgment of the Appellate Court and the decree of the superior court are reversed, and the cause is remanded to the superior court with directions to enter a decree in accordance with the prayer of the bill.

Reversed and remanded.

EDWARD SPENCER *et al.*

v.

ROSA B. SPRUELL.

Opinion filed April 16, 1902.

1. APPEALS AND ERRORS—*decree entered in accordance with verdict on issues of mental capacity and undue influence, not lightly disturbed.* A decree entered in accordance with the verdict of a jury upon the issues of mental capacity and undue influence will not be set aside as to such findings unless they appear from the record to be clearly against the weight of the evidence.

2. DEEDS—*effect of first taker's refusal to accept deed creating a fee tail at common law.* If the party to whom a deed to her "and the heirs of her body" is made refuses to accept the deed, no estate vests, and the "heirs" have no interest under the deed against which parties in whom the title is subsequently vested by a decree of court would need to be protected, since the statute changing a fee tail to a life estate with remainder in fee only operates when any person "might hereafter become *seized* in fee tail of any estate in lands," etc.

APPEAL from the Circuit Court of White county; the Hon. P. A. PEARCE, Judge, presiding.

This was a bill in chancery, filed by the appellee in the circuit court of White county, to set aside a certain division and transfers of the property of Joseph Spencer, deceased, made about two months before his death, on the grounds of his alleged mental incapacity, and undue influence by some of the beneficiaries.

Joseph Spencer died intestate about October 14, 1900, at about the age of eighty-four years. He had been afflicted, as alleged in the bill, both bodily and mentally, for the six months preceding his death. He left him surviving his widow, Nancy Spencer, and eight children, viz., Edward, Frank V., George W. and Joseph J. Spencer, his sons, and Mary A. Hanks, Sarah Hodgson, Martha Hill and Alma Goodman, his daughters, and two grandchildren, descendants of two pre-deceased children, viz.,

Chauncey Spencer and the complainant, Rosa B. Spruell. The widow, children and grandchildren were all made parties to the bill. Several years before the division in question Joseph Spencer had made advancements to all of his children above named, and to his grand-son, Chauncey Spencer, but none to his grand-daughter, Rosa B. Spruell, the complainant. On August 8, 1900, a justice of the peace was called to the house of Joseph Spencer, and together with seven of the children, Martha Hill not being present, they proceeded to divide up about $14,000 worth of notes and mortgages belonging to Joseph Spencer, among those present. Seven deeds of assignment were prepared by the justice of the peace and presented to Mr. Spencer for his signature that evening, but on account of his inability to get up at that time the signing was delayed till the next morning, at his request. They were not read to him, nor was he told what particular note and mortgage had been assigned to any particular child. He was told that the seven had got about $2000 apiece, and to this division he expressed assent. In this division no notice was taken of Martha Hill, Chauncey Spencer nor Rosa B. Spruell. It was subsequently discovered that all the property had not been divided and that the division was not properly made, and so a banker was called in about a week later to make another division. At this time Martha Hill appeared and was present and insisted on getting her share of the property. The figuring and dividing was done in a room adjoining the one in which Mr. Spencer was, because he said that it worried him to have it done in his presence. In this division the prior advancements and interest items were considered, but no account was taken of any claims of the grandchildren, and it does not appear that they had any notice of the proposed division. Ample provision had been made for and to the satisfaction of Nancy Spencer, the wife of Joseph Spencer. The circuit court found that, including advancements, the eight

children had received amounts varying from $8261.33 to $9169.40; that Chauncey Spencer had received $6250 and Rosa B. Spruell nothing.

About the time of this division, August 13, 1900, three of the sons, Edward, Frank and George, received, as they testified, $4000 from their father to invest in a farm for Rosa B. Spruell, and with this money they bought from Adam Johnson the east half of the south-east quarter of section 33, township 2, south, range 9, east, and the north half of the north-east quarter of section 4, and the north half of the south-west quarter of the north-east quarter of section 4, township 3, south, range 9, east of the third principal meridian, lying in Wayne county, Illinois, containing about one hundred and eighty acres, and took a statutory warranty deed therefor from Johnson to "Rosa B. Spruell and the heirs of her body," which deed contained the following clauses, after the description of the property: "If, however, any of the heirs of the body of the said Rosa B. Spruell shall die without issue, then and in that case the title to his portion of said land shall vest in his surviving brothers and sisters, and in case all of the heirs of the body of the said Rosa B. Spruell shall die without issue, then and in that case the title to said land shall vest in the heirs of Joseph Spencer, grandfather of said Rosa B. Spruell. The purchase money of the above described land is paid by Joseph Spencer, and this conveyance shall be considered, and is, in full of the grantee's portion of the estate of Joseph Spencer." They had the deed recorded, but complainant below refused to accept it, saying that the land was not worth what was paid for it.

It appears from the evidence that Joseph Spencer had had a paralytic stroke on April 7, 1900, from which time his health and mental capacity were impaired. He could not talk well after that, but gradually recovered somewhat, and could transact ordinary business with assistance. About August 2,—shortly before making the

division,—he had a second stroke, which confined him to his bed permanently. The testimony as to his mental capacity for the whole of this time and up to his death was very conflicting.

The court submitted to a jury the two issues of fact whether Joseph Spencer was of sufficient mental capacity to make a division of his property at the time it was done, and whether any undue influence was used upon him by any of the beneficiaries against the interests of the complainant. The jury found the first issue in the negative and the second in the affirmative, thus finding not only that he was mentally incompetent, but also that he was unduly influenced. The three sons who purchased the Wayne county land for Mrs. Spruell then (after motion for a new trial was overruled) filed their stipulation, whereby they agreed to take that land and pay the $4000 into the estate for distribution as the court should direct, provided the court could and would vest them with a clear title to the land, free from any claims or interests of Rosa B. Spruell, her husband, the heirs of her body, or the grantor, Adam Johnson. Such stipulation was not to be binding in case of a reversal of the decree. Appellee thereupon amended her bill accordingly, and made her husband, and Adam Johnson, the grantor, parties. The new parties came in and issues were made on the amended bill.

In the final decree the court found that, including the $4000 paid for the Wayne county land and the advancements and distributions, but excluding the amount received by the widow, the value of the estate was $78,205.11, and that the appellee, Rosa B. Spruell, was entitled to receive one-tenth of that amount, or $7820.51, and that Chauncey Spencer was entitled to $1570.51 in addition to what he had already received. The court then decreed that each of the heirs who had received more than the one-tenth of said total amount should pay the overplus into court, and the clerk was ordered to pay

the two grandchildren out of such money the amounts found due them, the widow having elected to accept the amount received by her in full of her dower, widow's award and share in the estate. It was further ordered that Edward, Frank and George Spencer pay into court the sum of $4000, and that the title in fee simple absolute to the Wayne county lands vest in them, and that all interests of the grantor and of the appellee and her husband be vested in them, and that a copy of the decree be filed in the proper recorder's office and operate as a deed of conveyance. From this decree the four sons and Alma Goodman and Mary A. Hanks have appealed to this court.

C. S. CONGER, and J. C. PEARCE, for appellants.

CREIGHTON, KRAMER & KRAMER, and W. T. BONHAM, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

After a careful consideration of this case we are convinced that the decree ought to be affirmed. While we have considered all of the questions raised by appellants there are but two necessary to be mentioned: First, it is contended that the findings of the trial court on the questions of the alleged mental incapacity of Joseph Spencer and of undue influence exercised over him are against the weight and preponderance of the evidence; second, that the decree does not sufficiently establish and protect in appellants Edward, George and Frank Spencer the title to the Wayne county land in accordance with their stipulation, by which they agreed to take title to said land and pay to the estate the $4000 which Joseph Spencer had advanced for its purchase, and that it was error to require them to pay said $4000 to the estate without vesting in them a good title in fee simple absolute.

As to the first question, it is sufficient to say that it does not appear that the findings are against the weight

or preponderance of the evidence. Nearly fifty witnesses were examined upon the questions submitted to the jury, and as usual in such cases there was an irreconcilable conflict in their testimony. Joseph Spencer was upwards of eighty-three years of age, and had within a few months been twice stricken with paralysis, when the division and transfers sought to be set aside were made. All the witnesses agreed that he was physically unable himself to perform the labor necessary to ascertain the amount of the principal and interest due on the notes and mortgages and the amount to be assigned to each of his children. He was confined to his bed, and so weak and helpless that he could not bear the worry which the calculation and figuring up in his presence of the different amounts, and the discussions incident thereto, caused him, and it was necessary for appellants and others engaged in that work to repair to an adjoining room, and when the assignments and transfers were prepared he was lifted from his bed to execute them, and although he could write when in health, his name was signed by others and he could only make his mark. We are satisfied, also, from the entire evidence, that his mind had become impaired to some extent from his disease and age, and the only doubt upon this question is as to the extent of this impairment. The chancellor adopted the verdict of the jury, and we cannot, from the evidence in the record, say that the finding was not a proper one and fully sustained by the evidence. Nor can it be said, reasonably, that the finding that the division and transfers were obtained by the beneficiaries, or some of them, by undue influence exerted over Joseph Spencer, was not authorized by the evidence. The division seems to have been agreed on by at least six of them, and was practically made by them, and in the absence and without the knowledge of the complainant in the bill. Martha Hill, one of the daughters of Joseph Spencer, was also absent and was excluded from any share in the first attempted division, and it is

clear from the evidence she would have been excluded from the final one had she not learned of it and appeared on the scene and insisted on having an equal share in the estate. It is a significant fact that it does not appear from the evidence that the donor was not as well satisfied with the division leaving his daughter Martha Hill unprovided for as with the later one giving her a full share, and that when she came to her father's house at the time, her contentions that she should share with the others in her father's bounty were not addressed to her father, but to her mother and her unwilling brothers. It appears, also, that Joseph Spencer executed, without question, every paper presented to him for his signature, —not only those making the final division, but also the previous ones found to be incorrect and for which the final ones were substituted; also, that he executed these assignments and transfers without reading or having them read to him, and that he did not know what property was assigned to each of his children or to any one of them. But further comment on the facts is unnecessary, inasmuch as we, after full consideration of them all, are of the opinion that they fully sustain the finding of the court. We would not be authorized to set such findings aside unless they appeared from the record to be clearly against the weight of the evidence. *Kinnah* v. *Kinnah*, 184 Ill. 284.

Nor are we of the opinion that the decree is erroneous on the second ground urged by appellants. The deed to the Wayne county lands was made to "Rosa B. Spruell and the heirs of her body." Appellants treat this deed as giving a life estate to Rosa B. Spruell and the fee to her children, and claim that although Mrs. Spruell refused to accept the deed, yet she could not by her refusal take away from her children the title in fee which it is claimed vested in them by the delivery of the deed to Joseph Spencer and the recording of the same by him. The language of the deed is in apt words to

create a fee in Rosa B. Spruell at common law, for as the word "heir" was necessary to create a fee, so in further limitation of the strictness of the feodal donation the word "body," or some other words of procreation, are necessary to make it a fee tail and to ascertain to what heirs in particular the fee is limited. (2 Blackstone's Com. 114.) The grantee was at liberty to refuse to accept the deed, and by such refusal the intended gift of a fee tail to her, or the estate which our statute creates from a fee tail, never took effect, and the equitable title would result to Joseph Spencer, whose money paid for the land, as recited in the deed. It is true that our statute converts a fee tail into a life estate in the first taker, with the remainder in fee simple to those to whom the estate would pass according to the common law on the death of the first taker; but this statute is only operative "in cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance." (Rev. Stat. chap. 30, sec. 6.) As Mrs. Spruell, by her refusal to accept the deed, never became seized, according to the common law, of a fee tail, the statute had nothing to operate on, and her children never had any title to be divested. They were not, therefore, necessary parties. The grantor and all the heirs of Joseph Spencer, including Mrs. Spruell, were before the court, and under the stipulation filed and the amendment to the bill the court had full power to render the decree it did.

Taking this view of the effect of the non-acceptance of the deed by Mrs. Spruell, it will be unnecessary to consider the other provisions of the deed, as they would also be inoperative.

Finding no material error in the record the decree must be affirmed.

Decree affirmed.

EMMA ALBRECHT

v.

WILLIAM HUNECKE.

Opinion filed April 16, 1902.

1. FIDUCIARY RELATIONS—*when fiduciary relation does not necessarily exist.* A fiduciary relation does not arise merely from the fact the parties are brother and sister and tenants in common.

2. SAME—*law does not presume that purchase by brother from sister is fraudulent because of relationship.* Ordinarily, tenants in common, though brother and sister, may deal with each other respecting the property, and the law does not presume that a purchase by the brother from the sister is fraudulent merely on account of their relationship, since the question whether there is a fiduciary relation between them depends upon all the facts of the case.

3. EQUITY—*when deed will not be set aside in equity.* A deed from sister to brother will not be set aside in equity on the ground of an abuse of a fiduciary relation between them, where the sister never questioned the validity of the deed for about fourteen years, although residing near her brother and with knowledge that he claimed to own the premises, was paying taxes thereon, keeping up repairs and supporting their mother, during all of which time there was neither disability nor confidential relation.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM HARTZELL, Judge, presiding.

R. E. DORSEY, and BURTON & WHEELER, for appellant.

E. C. & W. F. SPRINGER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The bill in this case was filed by appellant, Emma Albrecht, and prayed for a partition of eighty acres of land in Madison county and twenty acres in Macoupin county, and for an accounting, and the cancellation of any conveyances made by her affecting her interest in the land. By the bill she claimed title to the undivided half of the lands as tenant in common with her brother, the

appellee, William Hunecke, by descent from their father, Adolph Hunecke, who died May 27, 1884. She also alleged that the premises in Madison county were the homestead, and that she and appellee lived on the same with their mother; that there was no administration of the personal estate and appellee took possession of the same; that about one year after her father's death the appellee paid her $500 as her part of the estate; that she had been informed that appellee claimed to have some paper or papers releasing her interest in the premises for said sum of $500; that she did not knowingly sign any paper or papers that could affect her title to the premises, and that if the defendant held any such papers they were obtained by fraud, circumvention and misrepresentation. Appellee answered, admitting the death of the father, Adolph Hunecke, and that the title passed to appellant and himself subject to dower and homestead of the widow, and claimed title to the share of the appellant by virtue of conveyances to him. He alleged that the personal estate was properly divided and accounted for between his mother, appellant and himself, and set up the Statute of Limitations as to the personal estate. The cause was heard and the bill dismissed.

The evidence was to the following effect: Adolph Hunecke owned the lands and lived on the tract in Madison county, which was in cultivation and was his homestead. He died intestate May 27, 1884, leaving his widow, Mary Hunecke, and his two unmarried children, the complainant and defendant, his only heirs-at-law. The father had been troubled with asthma and finally died of consumption. Defendant and complainant worked on the farm before their father's death, and after that event they lived with their mother and continued to work there. The only money Adolph Hunecke left was $15, in three gold pieces, which the widow divided between her three children,—the complainant, the defendant, and August Hagemenn, a step-son of the deceased. There was some

farm machinery, live stock and other personal property, concerning the value of which there is much dispute, the testimony for the different parties fixing it at prices ranging from $550 to $2000. The land in Madison county was worth from $40 to $50 an acre, and there was a mortgage of $1375 upon it. The tract in Macoupin county was worth $20 an acre. The widow had dower in the lands and homestead in the eighty acres. There was no administration of the estate, and, consequently, no widow's award. The widow claimed the eighty acres as her own after her husband's death, and complainant called and treated it as the mother's place. Defendant worked the farm, giving his mother what money came in, and complainant did the housework, milked the cows and helped in the fields at times. In the spring of 1887 the complainant and the defendant had some talk about a settlement. The defendant asked complainant if she would take $500, and if not, he wanted the place sold. She told him she did not want the farm sold. Complainant testified that he said he was going to give her $500, and asked her if she would be satisfied with that first, and he would give her more after a while. He gave her his note for that amount and afterwards paid it. On March 8, 1887, she executed two quit-claim deeds, one for the eighty-acre tract, for the consideration of $400, and the other for the twenty-acre tract, for the consideration of $100. The deeds were made at the house by William McKittrick, who testified that he met defendant and complainant in town on the sidewalk; that they stopped him and said they had a little business they wanted fixed up about the land, and asked him if he would go to the house; that in a day or two he took both warranty and quit-claim deeds with him and went to the house; that defendant and complainant talked the matter over between themselves, and the complainant wanted him to fix it so there would be nothing coming back on her on account of the debts on the place; that he said he would

write out a quit-claim deed of the place that would clear her of everything, and that he wrote the deeds and they were signed. The complainant acknowledged the deeds the next day before a notary public at Staunton. She testified that she did not know what McKittrick's business was at the farm nor why he was there; that her brother never spoke a word about the land; that she never signed any deed, and never heard that she had signed any deed until about three weeks before she testified, and that she never saw the deeds or delivered any deeds. She further said that she did not know what she was signing when she executed the deeds; that she could not read English writing, and that the defendant was so cross and would growl at her that she would do whatever he wanted her to do. In November, 1887, complainant was married and removed to a farm near by. She was then about twenty-five years of age and the defendant four or five years older. After her marriage defendant told her she could have a heifer from the place, which she received. The defendant was married in the spring of 1889, and he and his wife and children have lived on the farm continuously. He has worked and managed it and took care of his mother until she died, January 19, 1901. The mother was very helpless before her death and for several months had to be cared for as a child. Defendant has paid all taxes and made all repairs, has built an addition to the house, and paid all the doctor's bills and expenses for his mother. He got $1000 from his father-in-law, which he used on the farm and for running expenses. He has reduced the mortgage $100 and renewed it for $1275.

It is argued that there was a fiduciary relation existing between complainant and defendant; that he obtained the deeds by virtue of that relation; that she was under his dominion and control, and that the burden was on him to show that the contract was reasonable, fair and for an adequate consideration, and if he failed to estab-

lish such facts and that the contract was beneficial to her, it must be set aside. There are relations which, from their very nature, imply duties and obligations and are fiduciary in their character, such as those of trustee and *cestui que trust*, guardian and ward, principal and agent, and the like; but a fiduciary relation does not arise merely from the fact that parties are tenants in common of real estate or because they are brother and sister. Ordinarily, tenants in common may deal with each other respecting the common property, and the law does not assume that a purchase by a brother from a sister is fraudulent merely on account of the relationship. The question whether there is a fiduciary relation between such parties, so that confidence is reposed by one in the other, will depend upon all the facts and circumstances of the particular case. In this case, if the circumstances would justify a conclusion that there was a fiduciary relation between the complainant and the defendant, and that the deeds were made because of a fear that the defendant would be cross and growl in case of refusal, no one disputes that such relation came to an end in the fall of 1887, when the complainant was married and left the premises. After that she lived with her husband on their own farm, separate from the defendant, and there remained nothing but the relationship of brother and sister. She was neither under his dominion nor control, but was entirely free from both. Although she says that she did not knowingly sign any deed, there can be no question that she did sign and acknowledge the deeds, and it is quite clear that she understood the bargain that she made and knew that she had executed the deeds. After her marriage she lived near by, and necessarily knew that her brother claimed to own the premises, was paying the taxes, keeping up the repairs and supporting and caring for their mother. For about fourteen years she did not question the transaction or the validity of the conveyances, during all which time

there was neither disability nor confidential relation, and equity would not now interfere in her behalf, even if the deeds were made when a confidential relation existed and under the influences which she states. She had executed the deeds and received the consideration and never offered to restore it, even in the bill filed in this case. According to her own account she knew that she had sold something connected with the estate and had received a note for $500 in payment. The note was paid long after her marriage, when she was living separate from her brother and does not claim that he exercised any influence over her. She took the money and kept it, knowing that it was for an interest in the estate. Her testimony that she never made any deed or disposed of her interest to the defendant in any way is wholly inconsistent with the argument of counsel that defendant obtained the conveyances by virtue of the influence arising from a fiduciary relation. She says she never sold her interest nor agreed to sell it, and that defendant never bargained for it, and that if any deed was obtained it was by fraud and deception, without her knowledge. That claim is satisfactorily met by the evidence, which shows that she knew what she was doing and that no fraud was practiced upon her.

It does not seem to be claimed that complainant could have any relief as to the personal property, and it is clear that she could not. Under all the circumstances we can not say that there are any equities in her favor. When the arrangement was made, the mother had a homestead in the farm and a right of dower in all the lands, and if there had been administration she would have had a widow's award. It is true that dower was never assigned and there was no administration; but it is also true that the children had assented to her claims, and it was understood that she was to have her home on the place and her maintenance from it. She continued to have her home there and her support from the place, and the only

justifiable inference is that it was so intended by the parties. We are satisfied that the court was right in dismissing the bill.

The decree of the circuit court is affirmed.

Decree affirmed.

ELLEN M. McDONALD, Exrx.

v.

MARY A. DANAHY.

Opinion filed April 16, 1902.

1. EVIDENCE—*when statements are not inadmissible as tending to contradict written assignment.* In an action by a principal to recover from the estate of her agent the value of shares of stock appropriated by him, the fact that the certificates bear assignments to the agent, duly signed by the principal, does not preclude evidence of admissions made by him tending to prove that the stock was the principal's property which he had appropriated to his own use without her consent, where there is no evidence that he paid anything for the stock or that it was a gift to him.

2. SAME—*what proper evidence on question of value of shares of stock.* In an action by a principal to recover the value of shares of stock appropriated by her agent, if the stock has no ascertainable market value it is proper to admit evidence as to the value of the property of the corporation above its indebtedness, as tending to fix the value of the stock.

McDonald v. *Danahy*, 96 Ill. App. 380, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Kane county; the Hon. HENRY B. WILLIS, Judge, presiding.

CHARLES WHEATON, for appellant.

J. J. O'CONNOR, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This litigation had its origin in the county court of Kane county, in which court Mary A. Danahy, the appellee, filed her claim against the estate of her brother,

Dan Danahy, for $7000, $4500 of which was for money, and the balance (of $2500) was for a certificate of twenty-five shares of the capital stock of the Aurora Cotton Mills, a corporation,—all alleged to have been the property of the claimant and to have been appropriated by said Dan Danahy, in his lifetime, to his own use. No part of the claim was allowed by the county court, but on appeal to the circuit court the claim to the extent of $2500 for the certificate of stock was allowed and judgment was entered accordingly. The Appellate Court has affirmed the judgment and settled in favor of appellee all controverted questions of fact.

The evidence tended to prove that appellee had in bank upwards of $27,000 and owned fifty shares of the capital stock of said cotton mills, of the face value of $5000, and that she gave to Dan Danahy a power of attorney, among other things, to sell, transfer and assign any notes, bonds or stocks and to use all moneys belonging to her as he might deem best, and that she authorized the bank to pay all checks signed in her name by Dan Danahy. But as there is no further contention except as to the judgment for the value of the twenty-five shares of the stock, the rest of the claim need not be further adverted to.

The evidence showed that Dan Danahy pledged the twenty-five shares to secure the payment of his note for $1500 given for borrowed money, and that the shares were sold, under the pledge, for the payment of this amount and the interest and expenses,—that is, for $1771.25. On the back of the certificate of shares there was an assignment of the stock to Dan Danahy duly signed by the appellee. There was no evidence of the purpose of this assignment, aside from the assignment itself, other than the statements made by Danahy himself, which tended to prove that the stock was the property of appellee and that he had appropriated it to his own use without her knowledge. He also had in his possession the certificate

of the other twenty-five shares, but there is no contention that those shares belonged to him. No transfer of the certificates appeared on the books of the corporation. But on this branch of the case it is sufficient to say that the evidence in the record is sufficient to sustain the judgment.

It is, however, contended by appellant that the court erred in admitting evidence tending to prove the conversion of this stock by Danahy to his own use because such evidence contradicted the assignment. We do not agree to this view. He was her agent. There was no evidence that he ever paid anything for the stock or that it was a gift to him, and the evidence was proper as tending to prove that he had appropriated it to his own use or was indebted to her for it. It was not admitted as bearing upon the legal effect of the assignment or to contradict or vary its terms, but only as showing that he was liable for its value.

Nor did the court err, as contended by appellant, in admitting evidence as to the value of the property of the corporation above its indebtedness, as tending to fix the value of the stock. It appeared that the stock had no ascertainable market value, and it became necessary to prove its value by the next best evidence. By ascertaining the value of the assets of the company and the amount of its liabilities and the dividends paid, the value of its capital stock could be determined with reasonable certainty. Appellee was entitled to its value, and was not limited to the amount realized at the sale by the pledgee long after her brother appropriated it. She did not sue for the proceeds of the sale by the pledgee, but for the value of her stock.

There was no error in the instruction. The judgment must be affirmed.

Judgment affirmed.

AMELIA C. HENRY, Admx.

v.

GEORGE W. CARUTHERS.

Opinion filed April 16, 1902.

1. PRACTICE—*provisions of section 90 of Practice act do not apply to chancery cases.* The provisions of section 90 of the Practice act, as to the Appellate Court's findings of fact being conclusive upon the Supreme Court, do not apply to chancery cases.

2. SAME—*enforcement of claim against estate of deceased partner is an equitable proceeding.* The enforcement of a co-partnership claim against the estate of a deceased partner in the probate court is a chancery proceeding, so far as the power of the Supreme Court to review the facts is concerned, since the probate court must exercise equitable powers in passing upon the claim.

3. PARTNERSHIP—*when a surrender of certificates of deposit does not release estate of deceased member of banking firm.* If the partnership articles of a banking firm provide that the death of any partner shall not dissolve the partnership, but the business shall be continued by surviving partners, who shall settle with the administrator of the deceased partner as soon as practicable, the surviving partners may take up certificates of deposit issued before the death of the deceased partner and issue new certificates, and the action of the depositor in receiving the new certificates with knowledge of the deceased partner's death does not amount to a novation, so as to release the estate of the deceased partner upon insolvency of the bank, in the absence of an express agreement.

4. SAME—*right of a creditor against estate of deceased partner.* Although a creditor of a firm knows of the death of one of the partners and continues to deal, as before, with the survivors, he does not lose his remedy against the estate of the deceased partner unless there is evidence showing an intention to abandon the right of having recourse thereto for payment, and the burden of showing such fact is upon the party who alleges it.

5. SAME—*fact that a creditor takes separate liability of surviving partners does not release estate.* There must be a deliberate assent upon the part of a creditor in order to release the estate of a deceased member of a firm from a partnership debt, and the fact that the creditor takes the separate liability of the surviving partners does not necessarily release the estate of the deceased partner.

6. SAME—*partners in a banking business may provide for continuing business by survivors.* Parties engaging in the business of banking may incorporate in their articles of agreement a provision author-

izing the survivors to carry on the business in the event of the death of a member of the firm, and courts will enforce the agreement until the representatives of the deceased partner take some steps to terminate the partnership.

Henry v. *Caruthers*, 95 Ill. App. 582, affirmed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

ROBERT H. PATTON, and EDWARD D. HENRY, for plaintiff in error:

Where a creditor of a partnership, after dissolution thereof, knowing that one or several of the partners have agreed with the others to assume and pay the debts of the firm, takes the obligation of those who should pay, in payment of his debt, and thus extends the time of payment, he thereby discharges the other partner. *Home Bank* v. *Estate of Waterman*, 134 Ill. 461; *Wiley* v. *Temple*, 85 Ill. App. 71; *Conwell* v. *McCowan*, 81 Ill. 285; *Hayward* v. *Burke*, 151 id. 133.

Defendant in error, by extending the time and surrendering old certificates, put it out of his power to sue for that length of time, and must have taken upon himself the risk of the firm becoming insolvent in the meantime, as it did in this case.

Where a party has notice of facts sufficient to put a prudent person on inquiry, he is chargeable with notice of such facts as would have been ascertained from a prudent investigation. *Parker* v. *Merritt*, 105 Ill. 293; *Railroad Co.* v. *Kennedy*, 70 id. 362; 16 Am. & Eng. Ency. of Law, 790.

Where surviving partners continue the business, creditors and third parties must take notice of their authority to the same extent and in the same way as such third parties would be bound to do in case of a first transaction with any new firm. Bates on Partnership, sec. 610; 17 Am. & Eng. Ency. of Law, 1137.

PATTON, HAMILTON & PATTON, for defendant in error:

Affirmance of a judgment by the Appellate Court implies a finding of facts the same way as the trial court found them, and this finding is, under paragraph 90 of the Practice act, conclusive on the Supreme Court. *Mann* v. *McKiernan*, 110 Ill. 102; *Northwestern Benevolent Ass.* v. *Hall*, 118 id. 169.

When the creditor of a firm takes the notes of the surviving partners for the amount of his claim, he does not release the estate of the deceased partner unless it is so agreed at the time, and the *onus* of showing that it is an extinguishment lies upon those who allege it.

To convert a partnership debt into a partner's separate debt the intention to do so must clearly appear. There must be a deliberate and mutual assent of creditor and debtor. *Hayward* v. *Burke*, 151 Ill. 121; *Thompson* v. *Briggs*, 28 N. H. 40; *Stover* v. *Hinkley*, Kirby, (Conn.) 147; *McLane* v. *Spencer*, 6 Ired. L. 423; *Titus* v. *Todd*, 25 N. J. Eq. 458; *Leach* v. *Church*, 15 Ohio St. 169; *Weirick* v. *Graves*, 73 Ill. App. 226; *Smith* v. *Rogers*, 17 Johns. 340; *Nightingale* v. *Chaffee*, 11 R. I. 609; *Collier* v. *Leach*, 29 Pa. St. 404; *Buxton* v. *Edwards*, 134 Mass. 567.

An attempt to obtain payment from the survivors is not sufficient evidence of an intent to abandon recourse to the estate of the retired partner, even though a judgment be obtained against the survivors. *Buckingham* v. *Ludlum*, 37 N. J. Eq. 137; *Jacomb* v. *Harwood*, 2 Ves. 265.

So of partial payments from the survivor. *Hammersly* v. *Lambert*, 2 Johns. Ch. 508; *Fogarty* v. *Cullen*, 49 N. Y. Sup. Ct. 397.

So proof in insolvency or bankruptcy against the continuing partner is not sufficient. *Sleech's case*, 1 Mer. 570; *Bilborough* v. *Holmes*, 5 L. R. Ch. Div. 255; *Harris* v. *Farwell*, 15 Beav. 31.

Knowledge of the arrangement between the retiring partner and the remaining partners, nor the partial payment of the debt, nor a demand for payment, nor all

combined, necessarily establish a consent upon the part of the creditor to accept the survivors in place of the deceased partner. *Walker* v. *Wood*, 170 Ill. 463.

Every partnership debt is joint and several, and in all such cases resort may be primarily had for the debt to the surviving partners, or to assets of the deceased partner. *Mason* v. *Tiffany*, 45 Ill. 392; *Silverman* v. *Chase*, 90 id. 37; *Doggett* v. *Dill*, 108 id. 560; *Mackay* v. *Pulford*, 36 Ill. App. 593; *Union Oil Co.* v. *Maxwell*, 33 id. 421; *Eads* v. *Mason*, 16 id. 545.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The defendant in error filed a claim against the plaintiff in error administratrix in the county court of Morgan county. The judgment in that court was adverse to the claimant. He brought the cause by appeal into the circuit court of Morgan county, and the venue of the cause was subsequently changed to the circuit court of Sangamon county, where, on a hearing, judgment was rendered in favor of the claimant, the defendant in error, in the sum of $14,983.33. The plaintiff in error prosecuted an appeal to the Appellate Court for the Third District, and a judgment of affirmance having been entered in that court, she caused the record to be brought in review in this court by this writ of error.

The intestate of the plaintiff in error, one Levi H. Henry, now deceased, during his lifetime was a member of a co-partnership composed of himself and seven other members engaged in the business of banking at Waverly, Illinois, under the firm name and style of "The Bank of Waverly." During the lifetime of said Henry the defendant in error deposited with said banking firm the sum of $12,000 of his individual moneys and the sum of $2900 which he held as conservator. The deposits were for definite periods of time, and bore interest at an agreed rate, and the defendant in error received certificates of deposit evidencing the transactions. Before the expira-

tion of the period for which the deposits were made the said Levi H. Henry departed this life. The surviving partners continued to conduct the business of banking under the same name and style, it being claimed the articles of co-partnership authorized them to pursue that course. The defendant in error, after the death of Mr. Henry, surrendered the certificates of deposit to said surviving partners and accepted other certificates therefor. The banking firm subsequently failed and proceedings by way of involuntary bankruptcy were instituted against the co-partnership. The defendant in error filed his claim in the bankruptcy court, and also in the probate court of the county of Morgan, against the plaintiff in error, who had been appointed administratrix of the estate of the said Levi H. Henry, deceased.

The defense sought to be interposed by the administratrix was, that a new obligation and a new debtor had been substituted for the old obligation with intent to relieve the deceased from all liability, and that all the requisites of a novation were established by the proofs.

The defendant in error urges that the affirmance by the Appellate Court of the judgment entered in the circuit court implies findings of fact in the same way as the trial court found them, and that such findings are, under paragraph 90 of the Practice act, conclusive on this court. This insistence cannot be maintained. The provisions of the Practice act have no application to causes in chancery. *Fanning* v. *Russell*, 94 Ill. 386; *City of Belleville* v. *Citizens' Horse Railway Co.* 152 id. 171.

At the common law a demand against a co-partnership was regarded as a joint debt, and after the death of one of the co-partners the right of action at law was against the surviving partner or partners. Equity, however, afforded a remedy against the estate of the deceased partner in the event of the insolvency of the surviving partner or partners. The common law rule was subsequently modified, and the rule established in equity that

all partnership debts should be deemed joint and several, and that a right of action existed at law against the surviving partners, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent or not. *Mason* v. *Tiffany*, 45 Ill. 392; *Doggett* v. *Dill*, 108 id. 560.

The probate court of Morgan county, in which the case originated, in the adjustment and allowance of claims against the estate of deceased persons, is invested with equitable jurisdiction. As the claim of the defendant in error against the personal representatives of the deceased partner is enforceable only upon equitable principles and not by an action at law, the adjudication of the claim in the probate court must be regarded as a proceeding in chancery, so far as the question of the power of this court to investigate as to the facts is concerned. *Doggett* v. *Dill*, *supra; Cheney* v. *Roodhouse*, 135 Ill. 257.

There seems, however, to be no controversy as to the facts material to the rights of the litigants. In brief the facts are: A co-partnership bank, doing business under the firm name of "The Bank of Waverly," at Waverly, Illinois, and composed of Levi H. Henry (intestate of the plaintiff in error) and seven others, some time prior to August 17, 1897, issued two certificates of deposit to George W. Caruthers, defendant in error, one for $12,000 to him individually, and another to him as conservator, for $2900, each falling due in a specified time, respectively. On August 17, 1897, Levi H. Henry died. The defendant in error was advised of his death. The surviving partners continued to conduct the business under the same firm name of "The Bank of Waverly." On or about October 12, 1897, the defendant in error came to the bank and said to the cashier that he had heard that the bank would be closed up on account of the death of Mr. Henry. The cashier, Mr. Hutchinson, who was also one of the surviving partners, told the defendant in error "that that could not happen, as the partnership contract provided

the business should continue," and that the bank would settle with the Henry estate in a short time. The defendant in error asked about the liability of the Henry estate, and was told that as for old contracts and moneys on deposit at the time of Mr. Henry's death the estate would doubtless be liable, but would not be bound for new contracts, new business and new indebtedness. A statement of the liabilities of the bank and the individuals thereof was then given to the defendant in error, which statement contained no reference to the estate of Henry or of one James Nevins, a partner who had withdrawn. Defendant in error said "he thought the bank was all right with Henry and Nevins out of it." Defendant in error surrendered his certificates, they being overdue, received the interest thereon and the certificates were canceled by the bank and new certificates for the respective amounts were issued to and accepted by him. The certificates recited the deposit by the defendant in error of the respective amounts in the Bank of Waverly, as did the certificates he surrendered. They were dated back to the time when the former certificates ceased to bear interest, bore interest from date, and were due, respectively, in three and six months from date. When the new certificates became due, in the early part of 1898, the interest thereon was paid and they were surrendered and other certificates of like character were issued and accepted by defendant in error. These latter certificates further extended the time of payment for fixed periods and provided for the payment of interest for such periods of time. On the 11th day of August, 1898,—a little less than a year after the death of Mr. Henry,—the surviving members of the firm made an assignment of the affairs and business of the bank for the benefit of creditors, in pursuance of the statute of the State, and were subsequently adjudged to be bankrupts, in a proceeding instituted in the courts of the United States under the Bankruptcy act of Congress. The defendant in error filed his claim in the court

of bankruptcy, and also the claim against the estate of the deceased partner here now under consideration.

The surrender by the defendant in error of the certificates issued to him while the deceased was a member of the banking firm and the acceptance by him of other certificates of deposit after the death of Mr. Henry from the surviving members of the firm, whereby the time of payment of the deposits was extended, it is insisted, were in fact payments of the original certificates held by the defendant in error; that thereby the old obligations were canceled and the obligations of the surviving members alone of the old firm accepted as the debtors. It is not contended there was any express agreement to accept the surviving members of the firm as sole debtors and release the estate of the deceased partner, but that such agreement or assent is to be implied from the acts and conduct of the defendant in error. We agree with the circuit and Appellate Courts that there was no such novation of the debt. The surviving partners, to whom the old certificates were surrendered and with whom the contracts were made for an extension of the time of payment of the deposits and for the payment of interest thereon, had the right, as surviving partners, to continue in the possession of the partnership effects, and, under the special agreement between them and their deceased co-partner, to continue to transact the business of banking, in which the firm was engaged at the time of the death of Mr. Henry. The articles of co-partnership provided that "the death of any partner shall not dissolve the partnership between the surviving partners, but the business shall be continued by the surviving partners and such others as may thereafter be admitted to said firm. The surviving partners shall settle with the administrator, executor or legatee of any deceased partner as soon after his death as practicable, and pay over to him, in money, the value of his interest in the business, as shown by the books of the firm; and no allowance shall be made nor

compensation paid to the representative of any deceased partner for the good will of the business or the continued use of the firm name by the surviving partners." Under this article of agreement it was entirely competent for the surviving partners to take up the certificates issued by the firm prior to the death of Mr. Henry and issue new certificates payable in the future, in accordance with the rules and customs pertaining to the business of banking. The certificates so issued were properly regarded, not as instruments extinguishing the indebtedness evidenced by the former certificates, but as evidencing a transaction entered into in the course of the continuation of the business of the firm after the death of Mr. Henry, in pursuance of the provisions of the articles of co-partnership.

In *Hayward* v. *Burke*, 151 Ill. 121, the authorities bearing upon the question whether the creditor of a firm has deprived himself of the right to look to the assets of a deceased member of the firm by the course of dealing pursued as to the demand with the surviving members of the firm, were reviewed and the conclusion declared that though a creditor of a firm knows of the death of one of the members thereof and continues to deal, as before, with the survivors, he does not lose the remedy which he had against the estate of the deceased partner unless there is evidence showing an intention to abandon the right of having recourse thereto for payment, and that the *onus* of showing an extinguishment of the debt of the firm and to convert a partnership debt into a debt of the surviving partners lies upon those who allege it; that there must be a deliberate assent upon the part of the creditor in order to release the deceased member, and that the fact that the creditor has taken the separate liability of the surviving member does not necessarily extinguish the liability of the estate of the deceased member of the firm. In the case at bar the surviving partners, after the death of Mr. Henry, acting under the authority resting in them by law, as enlarged by the pro-

visions of the articles of agreement, had, as we think, full power and authority to take up the certificates of deposit issued prior to the death of Mr. Henry, and, acting within the purposes of the agreement and the scope and usages of the banking business, to issue new certificates therefor. We see no reason why parties who desire to engage as co-partners in the business of banking may not incorporate in their articles of agreement a provision which will prevent the closing of the bank in the event of the death of a member of the firm, by authorizing the surviving partners to continue to conduct and carry on the business. Such a provision is intended to influence those having money to deposit in a bank to entrust it to the banking firm, which they might be loth to do unless assured that provision had been made to avoid closing up the doors of the bank in the event of the death of any member of the firm. No reason appears why the courts should refuse to enforce such an agreement, at least until the representatives of the deceased partner take some steps to bring the affairs and business of the partnership to a termination.

The certificates of deposit issued after the death of Mr. Henry were, in form, obligations of the firm of which he was a member, and, considered in connection with the agreement between the partners, constituted an obligation against his estate as well as the surviving partners. The acts and conduct of the defendant in error were not inconsistent with the view that he accepted the later certificates as binding the assets of the old firm and of the estate of each member thereof, whether living or dead, and as but a mere renewal of the obligations evidenced by the original certificates.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE CITY OF CHICAGO

v.

JULIUS CORCORAN.

Opinion filed April 16, 1902.

SPECIAL ASSESSMENTS—*what does not amount to arbitrary subdivision of land.* A provision in a sewer ordinance for "house connection slants of six inches internal diameter," to be placed on both sides of the sewer opposite each twenty-five feet of lot frontage, does not amount to an arbitrary subdivision of land assessed as an entire tract by its legal description. (*Vandersyde* v. *People*, 195 Ill. 200, followed.)

APPEAL from the County Court of Cook county; the Hon. WILLIAM T. HODSON, Judge, presiding.

EDGAR BRONSON TOLMAN, and ROBERT REDFIELD, for appellant.

MASON & NOYES, for appellee.

Per CURIAM: This is a petition filed in the county court of Cook county by the city of Chicago for the confirmation of a special assessment levied to defray the cost of constructing a sewer, with man-holes and catch-basins, in Fargo avenue, from Forest street to a point 415 feet east of the easterly line of Sheridan road, in the city of Chicago. The ordinance provided: "House connection slants of six (6) inches internal diameter shall be placed on both sides of said sewer opposite each twenty-five (25) feet of lot frontage." The appellee appeared and filed numerous objections. The only one relied upon, however, was that his land had been arbitrarily subdivided into 25-foot lots, which was sustained by the county court.

The property of appellee is an unsubdivided lot with a frontage upon Fargo avenue of 305 feet and a depth of 161 feet, and the assessment was made upon the entire tract as a whole, according to its legal description.

Under the authority of *Vandersyde* v. *People*, 195 Ill. 200, this was not a subdivision of appellee's property, and the assessment should have been confirmed.

The judgment of the county court is reversed and the cause remanded.

Reversed and remanded.

JOHN G. MAHON

v.

MARY DECKER MOONEY *et al.*

Opinion filed April 16, 1902.

WILLS—*temporary coma not inconsistent with testamentary capacity at other times.* That the testator was at times during his last illness in a comatose condition is not inconsistent with possession of testamentary capacity by him at other times than such intervals.

APPEAL from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

L. D. CONDEE, H. D. HEADLEY, and R. W. CONDEE, for appellant.

EDGAR BRONSON TOLMAN, and JOSEPH B. DAVID, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery filed by the appellant to contest the will of David C. Mahon, his father. The bill charged that the testator had been induced to execute the will through undue influence exercised by one of the legatees therein, Mary Decker Mooney, and also charged that the testator was lacking in the requisite mental capacity to execute a will. The issues made under the bill were heard before and submitted to a jury for decision. The verdict was adverse to the complainant, (the appellant,) and decree was rendered accordingly. This appeal seeks the reversal of such decree.

The rulings of the court as to the admissibility of testimony and in instructing the jury as to the principles of law applicable to the case are not complained of and are to be regarded as correct. The charge that the execution of the will was induced by undue influence had no support whatever in the testimony, and has been abandoned. But a single ground is urged for reversal of the decree, and that is, that the verdict is against the weight of the evidence upon the question of the mental power and capacity of the testator to dispose of his property by will.

The testator died on Friday, the 11th day of December, 1896, and the will was executed on Tuesday preceding his death. One of the witnesses in behalf of the appellant, a cousin of the appellant and a physician, expressed the opinion that the testator was of unsound mind one year preceding his death, but the evidence was overwhelmingly to the contrary, and counsel for the appellant in their brief say: "The contention of the contestant is that at no time after the Sunday before his death was David C. Mahon in a mental condition to make a valid will." In the investigation of this question we have had the aid of an exhaustive oral argument and also full printed briefs. We have diligently and carefully consulted the evidence preserved in the record. The opinions of many witnesses *pro et con* as to the mental condition of the testator were given in testimony before the jury. Counsel for the appellant contend it was the opinion of the greater number of those witnesses that the testator, on Sunday preceding his death, and from thence until Friday, the day of his death, was of unsound mind and incapable of executing a will. Perhaps in point of number of witnesses, merely, there is a slight preponderance in favor of this contention of the appellant, but where the greater weight of the testimony lies is not to be determined by a mere numbering of witnesses. The testator was, during the period to which this investigation is thus restricted, seriously ill,—at times in

a comatose condition,—and not, at such times, able to resist his physical afflictions and command his mental faculties. Temporary inability to exercise the powers of the mind,—to comprehend and reason rationally,—arising from the ravages of disease, is not inconsistent with the possession of testamentary capacity at other times than at such intervals. There was no proof of irrational acts or conversations on his part at any time during his illness. He was a portion of the time in an unconscious or semi-unconscious condition, and this seems to have been the ground or basis for the opinion expressed by a number of the witnesses that he was incapable of making a will. When not overcome in coma no one seems to have observed any fact or circumstance indicating that he was not of sound disposing mind.

The will was executed on Tuesday preceding the death of the testator on Friday. Dr. Flood, his attending physician, testified that on Monday, (to quote from the abstract prepared by the appellant,) "I told him he would have to prepare for the worst, and he had better get his affairs in shape. He spoke about that himself. I started to make out a memorandum on my prescription blanks of what he wanted to do. I started to make out a memorandum, until he got to specifically state who he was going to leave this piece of property to. I did not want to be mixed up with it, so I told him he had better send for his attorney. He mentioned some money he had in the safety deposit vault,—about $1200. Said it would defray all expenses. He also mentioned some property on Ohio street. I think he mentioned that should go to his son John, or his son John's son. I made out a memorandum of those things, and looked for it three days among a lot of old papers but did not find it. He talked about giving the property he was living in to Mrs. Mooney, and the property next door to somebody by the name of Foss or Doss,—a son-in-law of his. He said that Mrs. Mooney had been looking after him,—

something to that effect. I had seen Mrs. Mooney in the house; that is all I know of her. David C. Mahon was sane at that time." The same witness further testified: "After he had signed his will, when he was awake, he was of sound mind, but he would very readily go back into this sleepy or drowsy condition. He was sane."

The will was prepared by LeGrand W. Perce, an attorney at law. Charles D. Alberts, one of the attesting witnesses, detailed the occurrences connected with the making of the will, as follows, (to quote again from appellant's abstract): "The will was signed Tuesday morning. Col. Perce came the first time on Tuesday, between nine and ten o'clock. He went in and spoke to Mr. Mahon. I was in the other room right alongside of him. He brought his stenographer with him. Mahon told him he wanted to make his will. I was present at that time —right at the door. Col. Perce had said to me, 'I want you to sit at the door and see that nobody comes in the room.' I heard what was said. John Mahon and his son went into the room where David C. Mahon lay. At first he didn't seem to recognize John Mahon. Col. Perce told him that he was there, and said, 'Well, they are coming after I am dead,' or something to that effect, to Col. Perce. John Mahon came into the room before the will was signed. I started out to find John Mahon, when I met him coming in the yard. It was I who told him that his father was pretty sick, and sent him to him. He got there after Col. Perce had arrived. Col. Perce tried to get Dave Mahon to shake hands with his son. He said to him: 'Mahon, you don't know how long you are going to live now; John Mahon is your only boy; you ought not to die with any ill-feeling toward him; I think you ought to make up with him.' Dave Mahon said, 'He has not treated me right.' Col. Perce told him, 'You might as well make up with him.' They shook hands and John left the room. Col. Perce then sat down and took notes regarding the will. He asked him what dis-

position he wished to make of his property. Mr. Mahon said, 'Well, the house on Ohio street is John's anyhow, because it belonged to his mother. One of the houses,' he said, 'I am going to give to Willie.' Willie is his grandson, John Mahon's son. Col. Perce asked him what he was going to give John. He said, 'I ain't going to give John anything.' He again said, 'Well, I want to give Mrs. Mooney something.' Col. Perce asked him what he wanted to give Mrs. Mooney. He answered, 'Well, I thought about dividing up a flat building and giveng her a flat.' Col. Perce said, 'Better give her some money.' Mahon said, 'No, I won't give her any money.' Col. Perce said, 'You better give her a couple of thousand dollars.' Mahon said, 'I guess I know what I want to do.' He was pretty tired and lay back on his pillow. After he was again aroused Col. Perce asked him the same question. He answered, 'I will give her one of the houses, then.' Col. Perce said, 'If you are determined to do that, you had better fix it up now and get done with it, because you are getting pretty weak; I think you had better give your property to your son.' Mr. Mahon said, 'I know what I want to do with my property; I'll do as I damn please.' Col. Perce then drew up the paper and read it to him. I mean this will here. Mr. Stager was present in the room at this time. This was before Adams came into the room. After Col. Perce had read the will to Mr. Mahon he asked him if he were satisfied. Mr. Mahon answered, 'Yes.' He lay down again in bed. Col. Perce then asked him, 'Who do you want to witness this will; do you want Alberts?' Mahon said, 'Yes; I want Alberts to witness it.' Col. Perce then suggested Mr. Adams, an acquaintance of the family. They sent and got Mr. Adams. We went in. We stood at the foot of the bed. Col. Perce asked me to get something that Mr. Mahon could write on. I picked up something of rather solid substance. Mr. Adams and I raised Mr. Mahon up in bed, and I held him and held the paper and ink in my

left hand. I held Mr. Mahon up against my left shoulder, and he signed the will. We laid him down and Col. Perce said, 'Shall I read the will?' Mr. Mahon said, 'You read it once,' or something to that effect. Col. Perce said to me, 'Do you want to read it, Alberts?' I told him I knew what it was; maybe Mr. Adams did not. I knew what was in it, anyhow, and heard it all. Mr. Mahon had heard it. Mr. Adams then went home, and Mr. Mahon said, 'Get my pocket-book and pay the colonel.' So I got the pocket-book and paid him $50. Mr. Mahon remarked, 'It is a damned high price for a few minutes' work, ain't it?' He said it that way, and smiled, and said, 'He only charged me $25 for my wife's will; well, it is my last chance, and I guess they will get all the money they can.'"

If these witnesses were worthy of credit, the conclusion that the testator, at the time the will was executed, was possessed of ample mental power to dispose of his property by will, which would inevitably and properly arise in the minds of the jurors, could hardly be dislodged by a mere preponderance in the number of opinions held and expressed by other witnesses as to the mental condition of the testator at other times than when the will was signed and attested. The credibility of these witnesses was a question for the determination of the jury.

The suggestion of counsel for the appellant that "perhaps, after all, the medical testimony in this particular case is the most valuable," cannot avail to overturn the verdict of the jury. Four physicians gave testimony,—that of two of them, Dr. Flood and Dr. Moyer, to the effect the testator was sane; that of Dr. Tracy and Dr. Lambden to the contrary. There is no reason we should decline to accept the verdict of the jury as the true and correct solution of the issue of fact in the case.

The decree is affirmed.

Decree affirmed.

THE CITY OF CHICAGO

v.

CAROLINE C. HOLDEN *et al.*

Opinion filed April 16, 1902.

This case is controlled by the decision in *City of Chicago* v. *Sherman*, 192 Ill. 576.

WRIT OF ERROR to the County Court of Cook county; the Hon. EBEN B. GOWER, Judge, presiding.

CHARLES M. WALKER, Corporation Counsel, and WILLIAM M. PINDELL, for plaintiff in error.

GEORGE W. WILBUR, for defendants in error.

Per CURIAM: This is a special assessment proceeding to defray the cost of paving, curbing and guttering Warren avenue from Homan street to a point within ninety-eight feet of the east line of Fall street, in the city of Chicago. A judgment confirming the assessment was reversed in this court (*Holden* v. *City of Chicago*, 172 Ill. 263,) for the reason the ordinance did not prescribe the height of the curb. The cause was remanded, and this is a writ of error prosecuted to reverse the decision adverse to the city rendered upon a rehearing of the cause. The record and the matters assigned therein as for error are in all respects the same as were presented by the record in *City of Chicago* v. *Sherman*, 192 Ill. 576. What was there said as to the alleged errors upon the second hearing in that case is applicable to every contention advanced in this record. Upon the authority of the conclusion there announced, the judgment herein must be and is affirmed.

Judgment affirmed.

THE VILLAGE OF DOLTON *et al.*
v.
GEORGE A. DOLTON.

Opinion filed April 16, 1902.

APPEALS AND ERRORS—*when freehold is involved in appeal.* A freehold is involved in an appeal from a decree which contains findings on the disputed question whether or not an alleged highway existed over the land of the complainant in the bill, and which undertakes to determine where the freehold is.

Village of Dolton v. *Dolton*, 99 Ill. App. 141, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES G. NEELY, Judge, presiding.

I. T. GREENACRE, and OTTO F. REICH, for appellants.

JOHN C. TRAINOR, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Branch Appellate Court for the First District entered a judgment dismissing the appeal prosecuted by the appellants from a decree of the circuit court of Cook county, and the correctness of that judgment is questioned by this appeal.

Appellee, George A. Dolton, by his amended bill filed in the circuit court against the appellants, the village of Dolton, the president of its board of trustees and a justice of the peace, alleged that he was the owner in fee simple of certain real estate in said village conveyed to him by warranty deed December 13, 1872, of which he had been in exclusive possession from that time up to the filing of his bill, in 1899; that no public or private road had ever been in, upon or over said premises, and no road or highway, either by prescription, dedication or otherwise, existed on said premises; that the village of Dolton, seek-

ing to establish a contemplated road or highway over the same, had prosecuted him before a justice of the peace on a complaint charging him with obstructing a public highway over said real estate, called Hobson avenue; that on a trial he was found guilty and judgment entered for $1 fine and costs, and that the president of the board of trustees had destroyed a portion of the fence on said real estate for the purposes of the road. The complainant prayed for an injunction restraining the defendants from attempting to collect or enforce the judgment in any manner, or encumbering or clouding his title to said real estate by reason thereof, and for such other relief as equity might require. The bill was demurred to, and the demurrer being overruled, the defendants elected to stand by it, whereupon the court entered a decree finding all the material allegations of the bill to be true, and finding in express terms that complainant was the owner, in fee simple, of the real estate in question and in the peaceable and quiet possession and control thereof. The court also found that the title to complainant's freehold was involved in the suit before the justice of the peace, and that the justice had no jurisdiction to hear, try or determine the issue involving such freehold. By the decree the judgment was declared a nullity and set aside, and defendants were enjoined from attempting in any manner to collect or enforce it.

It is contended here that the appeal to the Appellate Court did not involve the freehold alleged by the bill to be vested in complainant, but only the jurisdiction of a justice of the peace to try a question involving such freehold. The allegations of the bill and the findings of the decree are not confined to the question of jurisdiction in the justice of the peace, but the decree undertakes to determine where the freehold is. Its findings are based on the allegations of the bill, and are not only that all the averments of the bill are true, but that the complainant is the owner in fee simple of the disputed property. The

decree contains findings on the disputed question whether the alleged highway existed over the land of the complainant and a freehold was involved. *Town of Brushy Mound* v. *McClintock*, 146 Ill. 643.

The judgment of the Appellate Court dismissing the appeal was right, but it is assigned as error that execution was awarded against the municipal corporation, and in this respect the judgment is erroneous. It is modified by striking out the order for execution.

The judgment of the Appellate Court as modified is affirmed. *Judgment affirmed.*

THE SPRING VALLEY COAL COMPANY

v.

JOHN ROWATT.

Opinion filed April 16, 1902.

1. TRIAL—*what evidence sufficient to go to the jury as to whether place where miner was injured was an exit to the escapement shaft.* Evidence that the passage where a mule driver in a mine was injured was the shortest road to the escapement shaft, although there was another longer road, is sufficient to go to the jury on the question whether such place was a "passageway communicating with the escapement shaft" or an "exit from main hauling ways to the escapement shaft," which by statute are required to be of a certain height and width.

2. MASTER AND SERVANT—*master's duty of furnishing safe place to work cannot be delegated.* The master cannot delegate to another the duty of furnishing his servant with a safe place to work, so as to relieve himself from liability for the neglect of such duty.

3. SAME—*when contributory negligence does not enter into case.* In an action for willful violation of the act for the protection of miners the question of the plaintiff's contributory negligence does not enter into the case.

4. APPEALS AND ERRORS—*when failure to limit recovery to ad damnum is harmless.* Failure of instructions to limit the plaintiff's recovery to the amount claimed in the declaration is harmless, where the amount claimed is $20,000 and the verdict is for $1200 damages for injuries which the evidence tends to show are permanent.

Spring Valley Coal Co. v. *Rowatt*, 96 Ill. App. 248, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Bureau county; the Hon. CHARLES BLANCHARD, Judge, presiding.

ALFRED R. GREENWOOD, for appellant.

J. L. MURPHY, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is a suit for damages for personal injury, brought by the appellee, against the appellant, in the circuit court of Bureau county. Upon trial before a jury there was a judgment rendered for $1200, which judgment, on appeal to the Appellate Court for the Second District, was affirmed. The appellant brings the case here for review.

The declaration charges that the appellant, a coal mining company in the State of Illinois, did not maintain its roadways and passageways communicating with its escapement shaft, wherein mules were being driven and the cars were being hauled, so that the same should not become obstructed, unsafe or dangerous to the driver, and did not keep the bottom, wall, roof and sides thereof free and clear of dangerous obstructions, low and confined places and other dangerous conditions, so that drivers might pass and ride along the same, conducting mules and cars, without coming in contact with or being borne violently against or getting caught or crushed in any such obstruction, low or narrow place or other impediment of said roadways, and did not keep said roadways of the height and width of five feet, and did not cause the said mine to be examined, on the morning of the accident, by a duly authorized agent of the appellant, to determine whether there were any obstructions or impediments to certain roadways, or other dangerous conditions, and permitted the appellee and other persons to enter into said mine, for the purpose of going upon

their employment therein, without such an examination having been made and without such duly authorized examiner having reported all conditions safe for beginning work, and without the record of such examination having been made, but therein made default, contrary to the law and the statute in such case made and provided; and also averred that appellant had due notice of the aforesaid dangerous condition of said roadway.

It appears from the record in this case that appellee, while engaged in his duties as a driver in the mine of appellant, and while passing along a certain passageway, was caught by the roof of such mine and thrown or jerked to one side of a loaded "trip" of cars which he was driving, and seriously if not permanently injured. It further appears that the roof at this particular point was about four feet to four feet six inches high; that it was extremely dangerous, and had been reported to the company by appellee a few days before this injury, at which time the company promised that it would repair the same, but no material effort to do so was ever made. No inspection of the mine had been made the morning of the day upon which appellee was injured, nor had there been an inspection made the day before. It seems the company had a book of blanks properly filled up, with the exception of the date and signature, certifying that the mine had been examined on each day, and that the same was found to be "free from dangerous gases, the air circulating properly and the entries in safe condition," but failed to report that all the conditions concerning which the statute requires an examination and report to be made were safe for beginning work. There is some evidence to the effect that appellee, after the injury, stated the accident was his own fault; that he had put a boy in his place, which he should not have done.

The appellant has filed in this court practically the same brief that was filed in the Appellate Court, and much space is devoted therein to the discussion of facts.

There was no instruction requested by appellant at the close of all the evidence to find the defendant not guilty, and therefore this court is precluded on all such questions of fact by the judgment of the Appellate Court.

The first question raised by appellant is, that there is no proof in this case to support the allegation of willful negligence, inasmuch as the proof showed that the passageway in which appellee was injured was not a "passageway communicating with the escapement shaft" nor a place of "exit from main hauling ways to the escapement shaft," and therefore the court erred in giving appellee's instruction No. 5, which was to the effect that if the defendant violated the provisions of the statute in maintaining the passageway where plaintiff was injured, and which passageway communicated with the escapement shaft, less than five feet wide or five feet high, and that such accident was the result of the willful failure of the defendant in that regard, then it was not necessary for the jury to find that the plaintiff, at the time of such accident and injury, was in the exercise of ordinary care, before the defendant could be found guilty. On the point covered by this instruction John McKenna testified: "In order to get to my place I would start at the bottom of the shaft and go right straight along the main entry about four or five hundred yards; then I would go straight east between four and five hundred yards, I think, then turn to the left and go about three hundred feet, then turn to the left again,—I couldn't say how far,—three hundred feet to the face of the coal. The route just described was the route to get out to the escapement shaft. You could get to it by what they called the 'sixth east,' but that was the longest road. The road I have just described was the shortest road from where I loaded the coal to the escapement shaft. That was the road John Rowatt worked in." We think this sufficient evidence to warrant the giving of the instruction and submitting that question of fact to the jury.

The second question raised is, that two or three days before the accident, after appellee had explained to appellant the dangerous condition of the roof, appellee, together with others, went to the particular place and attempted to clear up the roadway, and therefore the failure to put it in proper shape was a failure and negligence of a fellow-servant, for whose act, under the law, appellant is not liable, and therefore the refusal of the court to give instruction No. 9, which was to the effect that the plaintiff assumed the natural and ordinary risk incident to the business in which he was engaged, and that the employee contracted that the defendant should not be liable for injury sustained caused by the act of a fellow-servant, or where it was occasioned because of his own want of ordinary care for his own safety, was erroneously refused. This contention can have no weight. It is an elementary principle of law that the duty of furnishing a servant a safe place to work is non-assignable, and that the master cannot escape liability by an attempt to place such duty on the shoulders of another. This was the master's duty. As to this instruction there is also the further objection the allegation was that the defendant had violated the Mining act, and the question of fellow-servant did not arise. It also coupled on the question of ordinary care for his own safety, and we said in *Carterville Coal Co.* v. *Abbott*, 181 Ill. 495 (on p. 502): "Where an owner, operator or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein. Where such owner, operator or manager willfully disregards a duty enjoined on him by legislation of this character and places in danger the life and limbs of those employed therein, he cannot say that because one enters a mine as a miner with knowledge that the owner has failed to comply with his duty he is guilty of contributory negligence. * * * Mere contribu-

tory negligence on the part of a miner will not defeat a right of recovery where he is injured by the willful disregard of the statute, either by an act of omission or commission on the part of the owner, operator or manager." To the same effect are the cases of *Pawnee Coal Co.* v. *Royce*, 184 Ill. 402, and *Odin Coal Co.* v. *Denman*, 185 id. 413.

The next contention of appellant is, that the court erroneously refused defendant's instructions numbered 10 to 20, inclusive. These instructions state the rule as to what constitutes fellow-servants and the law applicable to the doctrine of fellow-servants, and also the doctrine of contributory negligence. It is clear, under the cases cited, that the question of contributory negligence did not enter into this case. Neither, under the evidence, did the question of fellow-servants enter into the case, and those instructions had no bearing on the issues submitted to the jury.

It is next insisted that it was error for the court to give instruction No. 1 and instruction No. 6 for the plaintiff, for the reason that by them the jury were told that they might give plaintiff such damages as would reasonably compensate him for the injury he had sustained, without limiting them to the amount sued for. The *ad damnum* clause of the declaration was for $20,000, and the evidence seems to indicate that the plaintiff is permanently injured. The amount of damages recovered in this case was $1200, which, from a review of the whole case, is reasonable. It could not be said that the jury were misled by such instructions or that the defendant was prejudiced in any way by the giving of them. The appellant, in the courts below, did not assign as error that the verdict of the jury was excessive, and we can not see that it was injured in any way by the giving of either of said instructions.

Finding no errors requiring a reversal, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

KAROLINA KOUTNIK

v.

KAROLYNA KOUTNIK.

Opinion filed April 16, 1902.

1. APPEALS AND ERRORS—*clerk has no power to approve bond unless by order of court.* Under section 69 of the Practice act the clerk of the court may, "by order of the court made at the time of praying the appeal and entered of record," approve the security on the appeal bond, but he is powerless to do so where the order granting the appeal confers no authority for such purpose.

2. SAME—*when a defective appeal cannot be cured by filing new bond.* If the only appeal bond filed within the time allowed is approved by the clerk without authority, the appeal is not perfected in time, and the defect cannot be cured by filing a new bond.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. C. H. DONNELLY, Judge, presiding.

FANNING & HERDLICKA, for appellant.

JOSEPH KOHN, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The sole question presented here is, did the Appellate Court err in dismissing appellant's appeal to that court? The circuit court, on the 25th day of March, 1901, entered a decree against the appellant, in favor of the appellee, finding that appellee was entitled to a vendor's lien on certain real estate for the sum of $1481.44, and ordered that in default of payment the said real estate be sold to satisfy the decree. The appellant prayed an appeal, whereupon the circuit court entered the following order: "Now comes the defendant, Karolina Koutnik, and prays an appeal to the Appellate Court for the First District from the above decree, which appeal is allowed upon said

defendant filing with the clerk of the circuit court a bond in the sum of $500 in thirty days." On April 16, 1901, an appeal bond was filed in the office of the circuit clerk and approved by him. On October 2, 1901, a transcript of the record was filed in the office of the clerk of the Appellate Court, and subsequently thereto, on motion of appellee, the appeal was dismissed for want of a sufficient bond, and the appellant has brought the record to this court for further review, and has assigned as error the action of the Appellate Court in dismissing said appeal.

Section 69 of the Practice act (3 Starr & Cur.—2d ed.—p. 3099,) is as follows: "The clerk of the court, may, by order of the court, made at the time of praying the appeal and entered of record, approve of the security offered upon such bond, and such approval may be made in term time or vacation." Appeals can only be taken by virtue of the statute, and then in accordance with the order of the court. The right of the court to delegate to the clerk authority to approve an appeal bond is solely by virtue of the statute. (*Abraham* v. *Huntington*, 19 Ill. 403; *Bowlesville Mining and Manf. Co.* v. *Pulling*, 89 id. 58; *Hileman* v. *Beale*, 115 id. 355; *Town* v. *Howieson*, 175 id. 85.) The circuit court, by the order allowing the appeal, having failed to authorize the circuit clerk to approve the appeal bond, he was powerless to approve the same. For a failure to file a bond, duly approved, within the time fixed by the court, the appeal was not perfected in time, and the defective appeal could not be cured by filing a new bond. (*Tedrick* v. *Wells*, 152 Ill. 214; *Ellison* v. *Hammond*, 189 id. 470.) The Appellate Court did not, therefore, err in dismissing the appeal.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

PHŒBE MATTHEWS
v.
ELMER GRANGER.

Opinion filed April 16, 1902.

1. BURDEN OF PROOF—*when defendant has burden of proving allegations of plea.* If the replication to a plea in replevin charging that the plaintiff sold property without the defendant's consent, in violation of the mortgage, consists merely of a denial of the allegations of the plea, the burden is on defendant to prove her plea.

2. PLEADING—*mortgagee alleging legal effect of mortgage is bound by her construction thereof.* If the defendant in replevin, who claims the plaintiff sold property in violation of a mortgage, does not set out the mortgage *in hæc verba* in her plea, but charges that it provided if any one sold the property without authority of said mortgagee it should be lawful for her to take possession of the chattels, she is bound by her construction of the mortgage, and cannot insist that the authority averred in the plea required written consent.

3. APPEALS AND ERRORS—*party specifying grounds of a new trial is confined to them on appeal.* If a party specifies the grounds of his motion for a new trial, he is confined, on appeal, to the reasons specified and set forth in his motion, and waives all other causes.

4. INSTRUCTIONS—*practice of singling out name of witness is disapproved.* The tendency of an instruction, relating to credibility of witnesses, which singles out the name of a witness, is to impress the jury with the idea that the court sees some special reason for discrediting his testimony, and while it may not reverse to give such an instruction, its refusal is generally approved.

5. WITNESSES—*rule as to discrediting testimony.* It is only where the jury believe that a witness has willfully sworn falsely to a material matter or that he has been successfully impeached that they may disregard his entire uncorroborated testimony; and if, notwithstanding the impeaching evidence, the jury still believe his testimony to be true, they cannot disregard it.

6. TRIAL—*when refusal to sustain challenge for cause is not harmful.* Refusal to sustain a challenge for cause against a certain juror is not harmful if the party challenges the juror peremptorily and it does not appear that she exhausted all her peremptory challenges.

Matthews v. *Granger*, 96 Ill. App. 536, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the County Court of Mercer county; the Hon. LUCIAN ADAMS, Judge, presiding.

CONNELL & THOMASON, and D. B. SNOW, for appellant.

BROCK & SCOTT, for appellee.

Per CURIAM: In deciding this case, the Appellate Court delivered an opinion, which, with a few unimportant changes, is as follows:

"Mrs. Matthews was Granger's landlord, and held a chattel mortgage from him to secure the rent. Claiming he had violated conditions of the mortgage she seized the mortgaged property. Granger brought this action of replevin to recover its possession. The first and second trials resulted in judgments in favor of Granger, which were reversed in 66 Ill. App. 121 and 71 id. 467. A third trial resulted in a verdict for Granger, and a fourth trial in a verdict for Mrs. Matthews, each of which the court set aside. At the fifth trial there was a fourth verdict for Granger, and a judgment thereon, from which Mrs. Matthews appeals. * * *

"1. The issues have been changed since we last remanded the cause, which was September 20, 1897. There are but two pleas in the present record. On September 26, 1899, defendant filed what is called an additional plea, setting up a mortgage by plaintiff to J. H. Calhoun of the horse 'Fred' as a violation of the mortgage to defendant. To this plea a demurrer was sustained on September 27, 1899, and that ruling is not assigned for error. Defendant afterwards asked leave to re-file a plea, and it is claimed the motion referred to said additional plea. The motion does not appear to have been decided, but if it was, no exception was taken and no error is assigned upon its denial. An amended and substituted plea was filed September 28, 1899, and upon it alone the cause was tried the last time. In that plea Mrs. Matthews set up her lease to Granger; his chattel mortgage, made for a sufficient consideration, to secure the rent; that it pro-

vided that if any one sold or disposed of the mortgaged chattels, or attempted to do so, without her authority or permission, she might take possession of the mortgaged property; that, the debt being unpaid and she still the owner thereof, Granger sold and disposed of potatoes, threshed oats and corn, covered by the mortgage, and also attempted to sell and dispose thereof, all 'without the proper authority or permission of this defendant;' that this was a breach of the mortgage, and because thereof she seized and detained the mortgaged property, as she lawfully might, and that this was the taking and detention in the declaration mentioned. Plaintiff replied 'that he did not, without the permission of the defendant, sell or attempt to sell, and did not, without the consent of defendant, dispose of any of the property which said plea charges he sold and attempted to sell, and which said plea avers he disposed of, all without the consent of defendant,' and that there was no consideration for the execution and delivery of said mortgage by him. This replication might well have been questioned for duplicity, but defendant did not demur. The replication tendered an issue to the country. The parties went to trial upon it, thus treating it as if a formal *similiter* had been added. The issues therefore were, (1) did Granger sell or attempt to sell or dispose of any potatoes, threshed oats or corn, covered by the mortgage; (2) if so, was this without the consent or permission of Mrs. Matthews; and (3) was there a sufficient consideration for the mortgage. The pleadings raised no other issue at the last trial. Mrs. Matthews' plea charged that Granger sold and attempted to sell without her proper consent and permission, in violation of the mortgage. That plea concluded with a verification. Granger's replication was a mere denial of the allegations of the plea. It did not aver any new facts. By this form of pleading the burden was upon Mrs. Matthews to prove that Granger had violated the mortgage by selling or attempt-

ing to sell mortgaged property without her consent. (*Osgood* v. *Groseclose*, 159 Ill. 511.) We are not called upon to determine whether a plea could have been so framed as to cast upon Granger the burden of charging and proving her consent. Mrs. Matthews tried the case upon the theory that the burden of proving that Granger's acts were without her consent was upon her. The first mention of consent at the trial was the testimony of Mrs. Matthews in her own behalf in chief that she gave neither oral nor written consent. Instructions numbered 13, 25, 26, 27 and 28, as offered by defendant, placed upon her the burden of showing acts by plaintiff violative of the mortgage without her consent or permission, and though they were modified in other respects, in this particular they were given as asked by defendant. The court therefore did not err in so trying the case as to leave upon her the burden of sustaining her plea.

"2. The mortgage offered in evidence required consent 'in writing expressed.' Plaintiff did not claim written, but only oral, consent for his deviations from the mortgage, and it is insisted the court erred in so instructing the jury as to make oral consent sufficient. Defendant did not set out her mortgage *in hæc verba* in her plea. She was therefore bound to state it according to its legal effect. She there pleaded it as providing that if any one sold, etc., 'without authority or permission of the said mortgagee,' it should be lawful for her to take possession of said chattels. This construction by her, in her plea, of the legal effect of her mortgage, must, we think, bind her at the trial. Proof of oral consent would relieve the mortgagor from liability of his property to seizure under that clause of the mortgage as pleaded. The defendant could not state one right in her plea and be permitted to rely upon a different right at the trial. The closing part of the plea was that plaintiff did sell, etc., 'without the proper authority or permission of this defendant.' This can only be referred to the authority or permission

the plea averred the mortgage required, which would be as well satisfied by oral as by written consent.

"The replication averred that plaintiff did not sell, etc., without defendant's consent, and she did not demur, or reply that written consent was necessary and was not obtained, but went to trial as if a *similiter* had been filed. Defendant tried the case the last time on the theory that under her plea oral consent was sufficient. She proved in chief that she did not give oral consent. Manifestly, after she had proved that, plaintiff had the right to meet her proof by testimony that she did give oral consent. Defendant obtained several instructions which assumed oral consent would be sufficient. She presented thirteen questions to be propounded to the jury for special findings, six of which inquired of the jury whether defendant had given plaintiff verbal authority or permission to do certain acts therein specified. The court consolidated these into six questions, each embracing the question of verbal authority or permission. True, defendant also asked an instruction that written permission was necessary and oral consent insufficient; but in view of the state of the pleadings, the course of the trial and the other instructions defendant obtained, we are of opinion the court correctly refused it. The question whether under such a mortgage, properly pleaded, oral permission to sell would justify the tenant in selling, is not presented for decision by the present record.

"3. The lease covered one hundred and forty-five acres. The rent was a share of the crops and cash rent for the pasture. By the terms of the mortgage, strictly construed, plaintiff could not eat potatoes or anything else grown in the garden, nor feed his horses anything grown on the premises. Defendant admits two verbal modifications, one of the lease and one of the mortgage, and one in her favor. She had intended to reserve in the lease one room in the house for her own use, but forgot it. Plaintiff and defendant afterwards verbally agreed she

might have that room. Defendant admits she authorized plaintiff to use some sheaf oats covered by the mortgage, he to re-place them by returning her an equal number of sheaves when the oats were threshed, which the proof shows he did. Plaintiff testifies that the consideration for the modification of the lease in defendant's favor about the room was that he should use the proceeds of the garden, he telling her it was a mistake that the garden had been included in the chattel mortgage, and she replying to go ahead and use it just as if it was not covered by the mortgage, and it would be all right. This she denies. He further testifies that after the mortgage was given he told her he would have to use his share of the crops as they matured to keep his family and stock; that she replied to go ahead and use it; that there was no law to prevent his using it to keep his stock and family. This also she denies. Plaintiff sold a peck of potatoes to a neighbor for use during harvesting, and received twenty-five cents therefor. These potatoes were dug in the garden. There is no proof he sold anything else on the farm, though there were circumstances which caused defendant to suspect he had disposed of some other items. He offered to sell that neighbor some more potatoes for use during harvesting if she could not get them elsewhere. He fed his stock from his share of the crops, and talked with the neighbors about exchanging some corn for hogs, and perhaps discussed or proposed some other exchange. The jury specially found that none of these acts were without the verbal authority or permission of defendant. We are not warranted in disturbing their decision of these questions of fact.

"4. The mortgage covered a horse 'Fred,' and it is argued the court erred in refusing to permit defendant to show that plaintiff afterward mortgaged the horse to J. H. Calhoun. This was not competent, for the plea upon which the case was tried only averred a sale, etc., of potatoes, threshed oats and corn, and not of this horse. Besides,

in her motion for a new trial defendant did not assign any rulings of the court in the admission or exclusion of evidence as a ground for such motion. When a party files his motion for a new trial and specifies the grounds of his motion, he is confined, on appeal, to those reasons specified and set forth in his motion in the court below, and is held to have waived all causes for a new trial not so stated. (*West Chicago Street Railroad Co.* v. *Krueger*, 168 Ill. 586; *Metropolitan West Side Elevated Railroad Co.* v. *White*, 166 id. 375.) Defendant waived this and all other alleged errors of the trial court in its ruling upon the evidence. After we granted defendant a rehearing in this cause she asked leave to assign as an additional error the rulings of the court upon the evidence. This we refused, both because the question could not be presented here upon such an assignment after it had been thus waived in the trial court, and also because a rehearing is only granted for the purpose of correcting errors into which the court may have inadvertently fallen in deciding the case as originally presented, and not to allow a party to present a different case from the one first submitted. *Gaines* v. *Williams*, 146 Ill. 450; *Railway Conductors' Benefit Ass.* v. *Leonard*, 166 id. 154.

"5. The court refused instructions 21 and 22 offered by defendant. No. 22 was to the effect that if Frank Snell testified at a former trial of this cause with reference to any material matter at variance with his testimony on this trial, such fact tended to impeach him, and unless he was corroborated the jury had a right to disregard his entire testimony. The practice of singling out a witness by name has often been disapproved. The tendency of such an instruction is to impress the jury with the idea that the court sees some special reason for discrediting the testimony of the witness so named. While it may not be reversible error to give such an instruction, its refusal is generally approved. (*Phenix Ins. Co.* v. *LaPointe*, 118 Ill. 384.) The issues were different at the last trial from

what they had been before. Under this instruction the witness could be treated as impeached by showing his contradictory statement in a matter material at the former trial but not material at this trial. Moreover, it is only where the jury conclude that the witness has willfully testified falsely in a matter material to the issue being tried, or that he has been successfully impeached, that the jury are authorized to disregard his entire testimony, where not corroborated. (*Bowers* v. *People*, 74 Ill. 418; *Miller* v. *People*, 39 id. 457.) This requires a successful impeachment. Proof of prior inconsistent statements, whether under oath or not, is merely evidence tending to impeach the witness. It is not successful 'if, after hearing the impeaching testimony, the jury still believe his testimony to be true.' (*Roy* v. *Goings*, 112 Ill. 656.) It is for the jury to determine, under proper instructions, whether the impeachment has been successful. (*Bressler* v. *People*, 117 Ill. 422; *Loehr* v. *People*, 132 id. 504.) If, notwithstanding evidence tending to impeach a witness, the jury still believe his evidence to be true, they are not at liberty to disregard it. (*Roy* v. *Goings*, *supra*.) Under the instructions here drawn in question the witness might have fully explained his former inconsistent testimony and shown it to be due to an innocent mistake, and the jury might believe the witness testified truly on this trial, and yet the jury would be authorized to disregard his testimony. An instruction on this subject much more nearly correct was disapproved by the majority of the court in *Healy* v. *People*, 163 Ill. 372. It is true, the principle of this instruction, when applied generally, was apparently approved in *Johnson* v. *Johnson*, 187 Ill. 86, but the point there under discussion was only as to the effect of corroboration. The cases there cited each required either successful impeachment, or that the witness had willfully testified falsely in a matter material to the issue, to authorize the jury to reject the testimony. None of them permitted the jury to disregard the testimony of

a witness merely because evidence tending to impeach had been introduced. It is evident the court in the *Johnson case* was only considering the effect of corroboration, and the cases cited were in point on that subject only. In *Pope* v. *Dodson*, 58 Ill. 360, the court said: 'A witness cannot be discredited simply on the ground of an erroneous statement. It is only where the statements of a witness are willfully and corruptly false in regard to material facts that the jury are authorized to discredit the entire testimony. The most candid witness may innocently make an incorrect statement, and it would be monstrous to hold that his entire testimony, for that reason, should be disregarded.' (*Allen* v. *People*, 82 Ill. 610; *Kornazsewska* v. *West Chicago Street Railroad Co.* 76 Ill. App. 366.) Instruction No. 21, directed to the testimony of plaintiff, was subject to the same and other objections. The court instructed the jury very fully for defendant, and no reversible error appears in the refusal of other instructions. The thirteen questions to the jury requested by the defendant were substantially embodied in the six questions the court submitted.

"6. Counsel for Granger made some questionable remarks in his closing address to the jury, but the court sustained a part of appellant's objections thereto, and appellant did not procure any ruling adverse to her to which she preserved an exception. *North Chicago Street Railroad Co.* v. *Shreve*, 171 Ill. 438; *North Chicago Street Railroad Co.* v. *Southwick*, 165 id. 494.

"7. It is assigned for error that the court did not sustain appellant's challenge for cause against a certain juror. Appellant afterwards challenged the juror peremptorily, and it does not appear that she exhausted her peremptory challenges. She was therefore not harmed by the ruling. *Ochs* v. *People*, 124 Ill. 399.

"8. The circuit court changed the venue to the county court. It is argued this was error, as the judge of that court was disqualified to try the cause because he had

been of counsel. Neither the action of the court nor any proof of any such disqualification appears in the bill of exceptions, nor any exception to the action of the court. Further, the cause was tried by another judge against whom no disqualification is alleged.

"The motion to tax the additional abstract against appellant is denied. The judgment is affirmed."

We concur in the views above expressed by the Appellate Court, and in the conclusion reached by that court. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

JOHN W. WILLIAMS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed April 16, 1902.

1. BURGLARY—*when burglar's tools may be put in evidence on trial for burglary.* Burglar's tools found upon the person of the accused when arrested may be put in evidence upon his trial for burglary, even though the carrying of burglar's tools constitutes a separate crime, where the property stolen at the time of the burglary is found in the possession of the accused, who claims that he acquired the same by purchase.

2. CRIMINAL LAW—*the Habitual Criminal law has not been repealed.* The Habitual Criminal act of 1883 has not been repealed. (*Featherstone* v. *People*, 194 Ill. 325, followed.)

3. SAME—*when conviction under the Habitual Criminal act is proper.* A conviction under the Habitual Criminal act is justified, even though the accused testifies that he was pardoned, where he admits three convictions, two of them the same as charged in the indictment, and only claims to have been pardoned on the third.

4. SAME—*when instruction on possession of stolen property is not erroneous.* An instruction is not erroneous which holds that the possession of stolen property, the proceeds of a burglary, larceny or robbery, soon after the commission of the offense, is *prima facie* evidence of the guilt of the person in whose possession it is found, and is sufficient to warrant a conviction unless such possession is satisfactorily explained, or unless there appears, from all the evidence, a reasonable doubt of the defendant's guilt.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

R. A. WADE, (F. M. BURWASH, of counsel,) for plaintiff in error.

H. J. HAMLIN, Attorney General, and CHARLES S. DENEEN, State's Attorney, (FRANK CROWE, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

During the night of June 14, 1901, a burglary of the express office of Peter E. Sorenson, in Chicago, was committed, and a trunk owned by Francis E. North, which was to be sent by express to Chattanooga, Tennessee, was broken open and clothing and a silk doily were stolen therefrom. On the night of July 15, 1901, plaintiff in error, while running south on Market street, in Chicago, was arrested by a police officer. When searched at the police station, a jimmy and punch and a pair of pliers and a case-knife were found in his possession. At his request two police officers were sent to his room for underwear, and they found in the room the clothing and doily stolen from the trunk at the time of the burglary of the express office. Plaintiff in error was then indicted and tried in the criminal court of Cook county for the burglary. The indictment charged him with receiving stolen property and also with the burglary of the express office, and alleged that he had been previously twice convicted of the crime of burglary and sentenced to the penitentiary. Upon the trial he was found guilty of burglary and sentenced to the penitentiary at Joliet.

It is first contended that the evidence did not warrant the verdict. The crime was committed on June 14, 1901, and a woman, at whose house defendant roomed, testified that he brought the stolen goods to his room in the mid-

dle of June, 1901. The defendant fixed the time that he brought them to his room a few days later, and testified that he bought the clothing from Charles Barker in the rear room of a saloon on June 20, 1901, for $26. It was admitted on the part of the People that Charles Barker and Barney Johnson, if present, would also testify to such purchase. There was evidence that he gave other and contradictory accounts of how he came into the possession of the clothing. Defendant worked in a rattan factory, and among the clothes was a dress suit, which, his counsel say, was unsuited to his station and which he had no use for. A policeman testified that defendant told him he had the dress suit made in Iowa and that a lady friend made the doily for him. The landlady testified that defendant said that a lady friend made the doily for him and that he brought the clothes from his former boarding place, where he had left them about the middle of the previous March. Counsel say he would not steal a dress suit because he had no use for it, but that would be a more forcible reason why he should not buy one or have one made. He might have thought it would have some value for trade, or sale, or some other purpose, if he was committing a larceny. The principal argument, however, under this head is, that it would be incredible that defendant should send police officers for underwear to the room where this stolen property was. He had been caught running away and with burglar's tools in his possession, and may have thought that his room would be searched in any event. Whether he thought that the property stolen from an express office, ready for shipment to another place, would never be claimed or identified, or whatever his reason for sending the officers to his room, that fact is not sufficient to raise a reasonable doubt of his guilt, in view of all the evidence. It is also urged that he proved a good character, which should be taken into account. Several witnesses from the factory testified that he had behaved as a good citizen during

their acquaintance with him, but he admitted that he had been in the penitentiary three times for burglary, and it can hardly be said that the evidence, as a whole, proved the fact that he had been a good citizen or bore a good character. We think the evidence justified the verdict.

It is next complained that the court made prejudicial remarks in the presence of the jury. Only one of the alleged remarks appears in the abstract, and no objection was made to it. It occurred when the burglar's tools were offered in evidence. Defendant's counsel objected to them, and the court, in ruling on the objection, said, "They are a circumstance in connection with defendant, therefore I think they have a right to be in." The defendant objected to the ruling and saved his exception. No question relating to the remark was preserved in the record. The objection to permitting the tools put in evidence was, that the carrying of them constituted a separate crime. The fact that it was a crime to carry burglar's tools did not render them inadmissible, if their possession also tended to prove the burglary charged in this case. Defendant claimed that he acquired the stolen property by purchase, and there was evidence that he had made other and contradictory statements on that subject. He was in possession of property stolen at the time of the burglary, and it was competent to show that he was possessed of burglar's tools for the commission of crimes of that character.

The next objection is, that the court permitted a police officer to testify that the defendant, at the time of the arrest when he was running away, said, "I was breaking in a saloon down there." Defendant moved to exclude the statement on the ground that it tended to prove another burglary different from the one charged in the indictment. The objection was overruled. No other burglary was proved or attempted to be proved. Defendant claimed that he had used the tools in the rattan business

in tearing down partitions at a shop where he had worked some time previously. The evidence tended to contradict him as to the use of the tools in connection with his work at the factory, and to show that they were for the purpose of committing crime.

The next point is, that the Habitual Criminal act has been repealed, and that it was error to prove the former convictions. It has recently been held that the act in question has not been repealed. *Featherstone* v. *People*, 194 Ill. 325.

The next objection is, that the court erred in admitting the record of a former conviction because the defendant had been pardoned. No objection to the record appears in the abstract. The only evidence of a pardon is the statement of the defendant on his cross-examination, when he testified that he was tried and convicted under the name of William Wright before Judge Anthony; that after his release from the penitentiary he adopted the name of William Douglas, under which he was tried before Judge Altgeld and sentenced to the penitentiary, and that he was afterward tried before Judge Jamieson, in 1888, and sentenced to the penitentiary for a term of twenty years, but was pardoned in 1894 or 1895 by Governor Altgeld. No motion was made, after this testimony as to the pardon, to strike out the record of the conviction in 1888. If defendant's evidence was proof of a pardon, it would have availed the defendant nothing to have the record in that case struck out, because the other conviction charged was proved and would bring him under the Habitual Criminal act. He admitted three convictions,—two of them the same charged in the indictment,—and only claimed that he was pardoned on the third conviction.

The third instruction given at the request of the People is objected to as encroaching on the function of the jury. It states the familiar rule that the possession of stolen property, the proceeds of a burglary, robbery or

larceny, soon after the commission of the offense, is *prima facie* evidence of the guilt of the person in whose possession it is found, and informs the jury that such possession is sufficient to warrant a conviction unless the possession is satisfactorily explained, or unless there appears from all the evidence a reasonable doubt of the guilt of the defendant. It is said that the instruction requires the defendant to satisfactorily explain the possession, which is a higher degree of proof than the law requires. The instruction, however, makes it sufficient for the defendant if it appears from all the evidence that there is a reasonable doubt of his guilt, and we do not regard the instruction as objectionable. The thirteenth instruction given at the request of the defendant told the jury that if they believed, from the evidence, that defendant bought the property from Charles Barker, as he claimed, that would be a satisfactory account of his possession and remove every presumption of guilt from such possession.

The sixth instruction is objected to as presenting to the jury only the question of guilt and not of innocence. The purport of the instruction is that the jury had nothing to do with the term of imprisonment or the consequences of the verdict, but were simply to determine the question whether or not the defendant was guilty. We see no objection to it, and it is not subject to the criticism offered.

The ninth instruction is also complained of, but it is the same instruction given in *Rider* v. *People*, 110 Ill. 11, relating to the proper tests for determining the credibility of the defendant. It was there approved by the court.

There is some other discussion concerning instructions, but they do not raise questions of sufficient importance to justify alluding to them. There was no error at the trial and no reasonable doubt of defendant's guilt.

The judgment of the criminal court is affirmed.

Judgment affirmed.

JULIA D. RAMSAY *et al.*

v.

E. P. RAMSAY, Admr.

Opinion filed April 16, 1902.

1. EXECUTORS AND ADMINISTRATORS—*general policy of the law concerning administration.* It is the general policy of the law that all the property of a deceased insolvent debtor not set apart for the widow and minor children shall become assets in the hands of the administrator for the payment, *pro rata*, of all his debts according to classification, no matter where the assets may be found or the creditors reside.

2. SAME—*when superior diligence by creditor confers no advantage.* Under the laws of Missouri providing that "if a person dies insolvent, his estate found in this State shall, as far as practicable, be so disposed of that all his creditors, here or elsewhere, may receive an equal share in proportion to their respective debts," creditors of an insolvent dying in Illinois can acquire no superior rights over other creditors of the same class by procuring administration upon the insolvent's property in Missouri and filing their claims there.

3. SAME—*administration in domicile of deceased is the principal administration.* Upon the death of a person intestate, leaving assets in different States, the administration in the domicile of the deceased is the principal administration through which, in contemplation of law, assets are to be distributed in payment of debts, while the administrations in other States are ancillary, and are granted in order to reduce the assets in such States to money.

4. SAME—*the duties and powers of ancillary administrators.* In the absence of a statutory provision it is the duty of an ancillary administrator to collect the assets and reduce them to money and transmit the same to the principal administrator, although he may, under certain circumstances, pay claims probated there and transmit the balance to the principal administrator; but if the estate is insolvent the ancillary administrator has no right to pay resident claimants, or persons who have filed their claims there, more than their *pro rata share of the whole estate.*

5. SAME—*when distribution of assets is proper.* If certain creditors of an insolvent dying in Illinois file their claims in the ancillary administration in Missouri and the assets there are divided among them *pro rata*, it is proper for the court, in ordering distribution in Illinois among creditors of the same class, to direct that the creditors of such class who did not share in the Missouri assets be paid the same per cent received by the others from the Missouri assets, before distributing the remainder *pro rata* among all.

Ramsay v. *Ramsay*, 97 Ill. App. 270, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Clinton county; the Hon. SAMUEL L. DWIGHT, Judge, presiding.

Rufus N. Ramsay died on November 11, 1894, residing in Clinton county, this State. His son, E. P. Ramsay, was appointed administrator by the county court of that county on the 17th of said month. A large number of claims were presented and allowed against the estate, aggregating $183,854.70. Among those claims was one in favor of Julia D. Ramsay, the widow of Rufus N., for $18,931.72, and another in favor of G. VanHoorebeke for $2020.42. Decedent owned a large amount of real and personal property in this State and also one city lot in St. Louis, Missouri. On the 8th of March, 1895, an administrator was appointed by the probate court of St. Louis in conformity with the laws of that State, it being there provided by statute that a non-resident of the State of Missouri could not administer upon an estate there. The claims of Mrs. Ramsay and VanHoorebeke were probated and allowed in the St. Louis county court, and through a proceeding by the administrator there to sell real estate to pay debts Mrs. Ramsay received $2561.51 and VanHoorebeke $278.03, being a *pro rata* payment of 12.44 per cent upon their respective claims. At the time that order of distribution was entered, appellee, the resident administrator, appeared in the St. Louis probate court and asked that the money in the hands of the administrator there be transmitted to him for distribution under direction of the probate court of Clinton county, but the request was denied. On the 25th of June, 1900, he presented a partial settlement of his administration to the probate court of Clinton county, charging himself with the two items paid to appellants in Missouri and taking credit for the same as having been paid upon their claims. This report showed the assets of the estate on that date,

including said claims, amounted to $131,810.42, and that the total liabilities of the estate to seventh-class claimants, including those of appellants, amounted to $183,854.70. On this report he asked for an order of distribution. Appellants appeared and filed objections, but the court ordered the administrator to pay fifty cents on the dollar upon all claims of the seventh class except those of the appellants, as to which he was directed to deduct the amounts received from the Missouri administrator and pay them fifty cents on the dollar upon the remainder of their claims. From that order they took separate appeals to the circuit court of Clinton county, where, by stipulation, they were consolidated and heard on an agreed statement of facts. The circuit court modified the order of the county court, and directed the appellee to pay all claimants, except appellants, 12.44 per cent on their claims, being the amount which they had already received, thus making all other claimants equal with them, and to then distribute the balance in his hands ratably among all claimants of the seventh class. Upon writ of error from the Appellate Court for the Fourth District the judgment of the circuit court was affirmed. From that judgment of affirmance this appeal is prosecuted.

It is admitted by all parties that the estate of Rufus N. Ramsay is insolvent, taking into consideration the assets in all jurisdictions. It was also stipulated that certain sections of the statutes of Missouri were in force at the time of the foregoing administration, being in the Revised Statutes of that State for the year 1889, to-wit:

"Sec. 128. That all claims shall be classified, those allowed within one year from the grant of letters to be of the fifth class and those allowed after one year and within two years to be of the sixth class."

"Sec. 261. When administration is taken in this State on the estate of any person who at the time of his death was an inhabitant of any other State or country, his real

estate found here, after the payment of his debts, shall be disposed of according to his last will, if he left any. * * * If there be no such will, his real estate shall descend according to the laws of this State. His personal estate shall be disposed of according to the laws of the domicile.

"Sec. 262. Upon final settlement, after the payment of all debts for which the same is liable in this State, the residue of the personal estate, if any, may be distributed and disposed of in the manner aforesaid by the court in which the estate is settled, or it may be transmitted to the administrator of the domicile of the deceased, as the court thinks best.

"Sec. 263. If a person dies insolvent, his estate found in this State shall, as far as practicable, be so disposed of that all his creditors, here and elsewhere, may receive an equal share in proportion to their respective debts.

"Sec. 264. To this end the estate shall not be transmitted to the foreign administrator until his creditors who are citizens of this State shall have received their just proportion that would be due them if the whole estate, wherever found, were divided among all of said creditors in proportion to their respective debts, without preferring any species of debt to another.

"Sec. 265. No creditor not being a citizen of this State shall be paid out of the assets found here until those who are citizens shall have received their just proportion, as provided in the preceding section.

"Sec. 267. No one shall receive more than would be due him if the whole estate were divided ratably among all creditors who shall have duly proven their claims in the court having jurisdiction thereof in this State.

"Sec. 268. The balance, if any, may be transmitted to the foreign executor or administrator, or if there be none, it shall in three years be distributed ratably among all creditors," etc.

G. VANHOOREBEKE, *pro se*, and S. P. BOND, for appellant Julia D. Ramsay:

The moneys arising from the sale of real estate in Missouri are not assets in the hands of the administrator in Illinois, and he, therefore, had no right to take credit for the moneys paid to Mrs. Ramsay and Mr. VanHoorebeke by order of the probate court of St. Louis. Story on Conflict of Laws, 523; *Peck* v. *Mead*, 2 Wend. 471; *Hooker* v. *Olmstead*, 6 Pick. 481; *Goodwin* v. *Jones*, 3 Mass. 513.

The liability of lands of a decedent to pay debts depends upon the statutory provisions in relation thereto, and such statute laws must be followed. *Springfield* v. *Hurt*, 15 Fed. Rep. 307; *French* v. *Shatton*, 79 Mo. 506; *Bauer* v. *Gray*, 18 Mo. App. 173; *Johnson* v. *Holliday*, 68 Ga. 81.

The creditors proving their claims during the first year of administration in Missouri established a prior lien to all other creditors who proved their claims the second year and to those who failed to prove up their claims in Missouri. *Vansyckle* v. *Richardson*, 13 Ill. 171; *Myer* v. *McDougal*, 47 id. 278.

If the assets of a debtor are insufficient to satisfy all his debts, a creditor has a right to resort to the fund open to himself, and is not precluded from claiming from the funds of the estate, which are open to all creditors, a dividend on the full amount of his debt. He is not limited merely to a dividend on the balance, but the total received by him cannot exceed the sum due. *Mores* v. *Raulet*, 2 N. H. 488; *Miller* v. *Estate*, 82 Pa. 113; *Logan* v. *Anderson*, 18 B. Mon. 144; *Furness* v. *Bank*, 147 Ill. 570; *Levy* v. *Bank*, 158 id. 88; *First Nat. Bank* v. *Bank*, 151 id. 308; *Trust Co.* v. *Stewart*, 65 Ill. App. 391.

Appellants, by virtue of the laws of Missouri and by reason of their diligence in filing their claims within the first year of administration, became preferred creditors of the fifth class and entitled to priority of payment. Rev. Stat. of Mo. 1889, sec. 128.

This remedy was open to all of Ramsay's creditors, of which they might have availed themselves and have had their claims placed in the same class, but having failed to do so, by their *laches* were precluded from participating in the 12.44 per cent awarded to appellants under the laws of Missouri and the order of the probate court of St. Louis. Rev. Stat. of Mo. 1889, sec. 128.

The administration of an estate is governed, as to creditors, by the law of the place where the representative acts and was appointed, and therefore all questions as to priority of debts, the method of proving them, etc., must be determined by the law of the place where the administration is had, without regard to the domicile of the decedent or of the creditors, or the *lex loci contractus.* The law of place where the administrator acts governs as to the payment of debts. *Party* v. *Lortorch*, 54 Miss. 66; *Carroll* v. *McPike*, 52 id. 569; *Jones* v. *Drewery*, 72 Ala. 311; Rev. Stat. of Mo. 1889, sec. 261; 1 Woerner on Am. Law of Administration, (2d ed.) sec. 168; *Smith* v. *Bank*, 5 Pet. 513; *McElmoyle* v. *Pohn*, 13 id. 312.

M. P. MURRAY, for appellee:

The assets of the estate of Ramsay in the State of Missouri were legal assets, as distinguished from equitable assets. Story's Eq. Jur. sec. 551.

Where real estate of a decedent is sold to pay debts, when it is converted into money it is personal estate in the hands of the administrator for the payment of debts. It is only the surplus for distribution to the heirs which is to be distributed as real estate. *Lovegrove* v. *Cooper*, 2 Sm. & Griff. 271.

An insolvent estate of a non-resident of Missouri administered there must be so disposed of that all the creditors in Missouri and elsewhere may receive a share in proportion to their respective debts, and no one shall receive more than would be due him if the whole estate were divided ratably among all creditors who have duly

proved their claims. On this being done, the remainder of the estate is to be transmitted to the principal administration. Rev. Stat. of Mo. secs. 263-268.

Where there are administrations of the estate of a decedent in different jurisdictions, the administration of the domicile is the principal administration, and the others, whether ancillary or independent, are necessarily auxiliary administrations. *Young* v. *Wittenmyre*, 123 Ill. 307.

The rights, privileges, priorities, liens and preferences in respect to the legal assets of an insolvent estate are precisely those which exist at the moment of the decedent's death, and not other or different. These may be lost by neglect, but no creditor can by any process of administration gain any advantage over other creditors of the same class who proved their claims. *Scott* v. *Ware*, 74 Ala. 182; 1 Daniel's Ch. Pr. (5th ed.) sec. 236; 5 Ency. of Pl. & Pr. 609-612.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

It is insisted by appellants that they are entitled to receive full distributive shares of the assets reported by the administrator to the probate court of Clinton county without in any way being charged with the amounts received from the Missouri assets. The proposition is so manifestly unjust to other creditors of the insolvent estate that it should be sustained only in obedience to strict and imperative requirements of the law. The general policy of the law in all jurisdictions, so far as we are aware, is, that all the property of a deceased insolvent debtor not set apart for the widow or minor children shall become assets in the hands of his administrator for the payment, *pro rata*, of all his debts according to classification, no matter where the assets may be found or the creditors reside. In *Dawes* v. *Head*, 3 Pick. 128, it was said by Parker, Judge: "We cannot think that in any civilized country advantage ought to be taken of the accidental

circumstances of property being found within its territory which may be reduced to possession by the aid of its courts and law, to sequester the whole for the use of its own subjects or citizens, and where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government." The above quoted sections 263 and 264 of the Missouri statute, as well as other sections of that statute, clearly recognize this just and equitable rule. Our statute provides, that "when the estate is insufficient to pay the whole of the demands, the demands in any one class shall be paid *pro rata*, whether the same are due by judgment, writing obligatory or otherwise, except as otherwise provided." (1 Starr & Cur. chap. 3, sec. 71.) Unless, therefore, appellants have shown that their claims are in some way exceptions to the general rule, the judgment of the circuit court is right and should be affirmed.

It seems to be thought by appellants' counsel that they are entitled to a preference over other creditors, as to the Missouri assets, on the principle that in the settlement of insolvent estates a creditor shall be allowed to prove his whole debt without regard to any collateral security he may hold, and be entitled to a dividend on the whole claim so allowed,—citing *Furness* v. *Union Nat. Bank*, 147 Ill. 570, *First Nat. Bank of Peoria* v. *Commercial Nat. Bank*, 151 id. 308, *Levy* v. *Chicago Nat. Bank*, 158 id. 88, and cases from other jurisdictions holding the same rule. No argument seems necessary to show that the doctrine of these cases can have no application to the question at issue. How can it be said that the Missouri property was in any sense a collateral security for appellants' claims, or that it was a fund open to them for the payment of their debts rather than those of all other creditors? At the time of the death of Ramsay he owned the property free from any lien whatever in their favor, and it was liable for the payment of all his debts.

It is further contended that appellants are entitled to a preference over other creditors in that property because of some superior diligence on their part. No reason or authority is cited in support of this contention, and none, we think, can be It was undoubtedly the right of all the creditors of Rufus N. Ramsay to have the Missouri estate, as well as his Illinois property, converted into money and applied in payment of his debts, and it was the duty of the resident administrator to see that that purpose was accomplished. Being a non-resident of the State of Missouri, and therefore disqualified by the statute of that State from taking letters of administration himself, it was his duty to procure administration in the name of a resident. It was undoubtedly also the privilege of any creditor to cause such administration. It was also proper for Illinois creditors to file their claims and have them allowed in the probate court of St. Louis and to cause the real estate there to be sold for the payment of the debts of Rufus N. Ramsay, but not for the payment of the claims probated there, alone, because by the express provisions of the statute of that State, the estate being insolvent, the property found in Missouri was to be so disposed of that all his creditors there and elsewhere should receive an equal share, in proportion to their respective debts. There was no occasion for diligence upon the part of creditors in filing their claims there. They each had a right to rely upon the Missouri statute for protection against the claim now made by appellants.

Upon the death of a person intestate, leaving assets in different States or countries, the administration in the domicile of the deceased is the principal administration through which, in contemplation of law, assets are to be distributed in payment of his debts. (*Young* v. *Wittenmyre*, 123 Ill. 303.) Administration in other States or jurisdictions must be held in order to collect the debts and reduce the assets into money, which are known as

ancillary or auxiliary administrations. In the absence of statutory provision it is the duty of the auxiliary administrators to collect the assets, reduce them to money and transmit them to the principal administrator, or they may, under certain circumstances, pay claims probated there, transmitting only what remains in their hands to the principal administrator. Where, however, the estate is insolvent, it has been held, and we think with reason and justice, that the auxiliary administrator has no right to pay resident claimants, or those who have filed their claims there, more than their *pro rata* share of the whole estate. (*Dawes* v. *Head*, *supra*; *Davis* v. *Easty*, 8 Pick. 475; *Minor* v. *Austin*, 45 Iowa, 221; 2 Kent's Com. 434.) Manifestly, under section 263 of the Missouri statute, the administrator there had no right to pay these appellants more than their proportionate part of the whole assets, taking into account all seventh-class "creditors there and elsewhere," even though the property in that State had sold for enough to pay them in full, and, as we have said, every "creditor there or elsewhere" had a right to rely upon his performing his duty under that statute. He might have complied with the request of appellee, and after paying the small claims of resident creditors transmitted the balance of the fund in his hands for distribution. However, his refusal to do so, and the refusal of the St. Louis probate court to order him to do so, did not render it impracticable to still give effect to said section 263 and the provisions of our own statute, above quoted.

It is to be observed that these appellants are not content with what the Missouri court gave them, but come into the probate court of Clinton county and demand that they shall be allowed to participate in the assets in the hands of the appellee, the resident administrator. Having done so, we entertain no doubt that the latter court had the power, and that it was its duty, to require them to account for that which they had received under the

Missouri administration, and to order a distribution *pro rata* among all the seventh-class creditors.

The judgment of the circuit court to that effect was right, and was properly affirmed by the Appellate Court.

Judgment affirmed.

NATHANIEL GANDY *et al.*

v.

LYDIA J. COLEMAN *et al.*

Opinion filed April 16, 1902.

1. APPEALS AND ERRORS—*one cannot complain of error not affecting his interests.* Where mortgagors have parted with their whole title to their grantee, they cannot, in case of foreclosure, urge as error provisions of the decree affecting the disposition of the title between their grantee and a subsequent purchaser from him.

2. MORTGAGES—*when accrued rent should not be applied upon a deficiency decree.* A grantee of the mortgagors who assumes the encumbrance becomes the principal debtor and the mortgagors stand in the position of sureties for him, but they are not entitled to have rents which accrued prior to the filing of the foreclosure bill, and which were not subject to the lien of the mortgage, applied upon the deficiency decree, where there is nothing to show that their grantee is not able to discharge the obligation which he assumed.

Gandy v. *Coleman*, 99 Ill. App. 391, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Christian county; the Hon. TRUMAN E. AMES, Judge, presiding.

FRANK P. DRENNAN, for appellants.

JOHN E. HOGAN, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Third District affirming a decree of the circuit court of Christian county in a suit instituted by the

appellee Lydia J. Coleman for the foreclosure of a mortgage made to her by the appellants, Nathaniel Gandy and Loretta F. Gandy.

The first alleged error argued by counsel for appellants is, that the decree is not based upon the pleadings but grants relief not warranted by them. The provision of the decree which is said to be beyond the scope of the pleadings is one which sets aside a conveyance of the mortgaged premises by George E. Sharp to N. Douglas Ricks and re-invests the title in Sharp. The bill was the ordinary bill to foreclose the mortgage made by appellants, and it averred that they conveyed the premises, subject to the mortgage, to appellee George E. Sharp, who assumed the mortgage debt as a part of the purchase price of the premises, and that Sharp conveyed the premises to N. Douglas Ricks, who did not assume the debt. Appellants and the appellees George E. Sharp and the heirs and personal representatives of N. Douglas Ricks, who had died, were made defendants. George E. Sharp answered that the conveyance of the mortgaged premises by him was made to N. Douglas Ricks as the agent of the mortgagee, Lydia J. Coleman, in satisfaction of the mortgage indebtedness, and he also filed a cross-bill alleging that, a foreclosure of the mortgage having been threatened, he executed the deed to N. Douglas Ricks, as the agent of Lydia J. Coleman, in payment of the debt and delivered possession of the premises to such agent. The prayer of the cross-bill was that the heirs and representatives of N. Douglas Ricks be required to convey the premises to Lydia J. Coleman in satisfaction and discharge of her mortgage, or if that relief was refused, that an account should be taken of the rents and profits collected by N. Douglas Ricks and his heirs and representatives, and they should be required to pay the same to said Sharp. Lydia J. Coleman answered the cross-bill, denying the authority of N. Douglas Ricks to transact business generally for her or to accept the conveyance in

satisfaction of the mortgage. By the decree the mortgage was foreclosed and a sale ordered, and the court also set aside the conveyance from George E. Sharp to N. Douglas Ricks, and ordered the executrix of N. Douglas Ricks to pay to George E. Sharp, in due course of administration, $121.78, the net amount of rents received. Appellants were the mortgagors and had parted with their whole title to George E. Sharp. They are in no manner interested in what became of the title after they conveyed it, or in the relative rights of George E. Sharp and the heirs and legal representatives of N. Douglas Ricks. If there was any error in setting aside the conveyance, it was one which in no way concerned the appellants, and they are not entitled to be heard on the subject.

One other complaint is made, and it is that the decree is conflicting and uncertain in its provisions. While it orders the executrix of N. Douglas Ricks to pay to George E. Sharp, in due course of administration, the net amount of rents collected, the court, in its findings preceding that order, recites that the rents ought to be applied on the mortgage indebtedness. Upon a sale there was a deficiency of $478.60, for which a decree was rendered against appellants and the appellee George E. Sharp. Appellants insist that the rent should be applied on that deficiency decree. George E. Sharp having assumed the encumbrance, became, as between him and appellants, the principal debtor and appellants occupied the relation of sureties for him. The rents accrued before the bill was filed to foreclose the mortgage and were not subject to the mortgage lien. The court having found that N. Douglas Ricks held the title in trust, not for the mortgagee, but for George E. Sharp, the rents belonged to the latter. Neither Lydia J. Coleman nor appellants had any lien upon the rents, and there is nothing in the record showing any equity of appellants, as sureties for George E. Sharp, to have the money applied on the deficiency de-

cree. If there was any error in the decree it was in finding that the rents ought to be applied on the mortgage debt, and not in the decree of the court that it should be paid to George E. Sharp. There is nothing to show that he is not entirely responsible and able to discharge the obligation he assumed.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Mr. JUSTICE RICKS, having been of counsel in this case below, took no part in its decision here.

CARRIE KINGMAN

v.

THE PEOPLE *ex rel.* D. C. Gannaway, County Collector.

Opinion filed April 16, 1902.

This case is controlled by the decision in *Craig* v. *People ex rel.* 193 Ill. 199.

WRIT OF ERROR to the County Court of Coles county; the Hon. JOHN P. HARRAH, Judge, presiding.

JAMES W. & EDWARD C. CRAIG, for plaintiff in error.

Per CURIAM: This case is in all respects like that of *Craig* v. *People ex rel.* 193 Ill. 199, and it is stipulated by the parties that it should be submitted on the same briefs and arguments filed in that case. The result must be the same, and for the reasons stated in the opinion in that case the judgment of the county court will be reversed and the cause remanded.

Reversed and remanded.

JACOB GLOS

v.

JOSIAH CRATTY.

Opinion filed April 16, 1902.

1. APPEALS AND ERRORS—*decree must be reversed if no evidence to sustain it is preserved.* A decree in chancery must be reversed, on appeal, if the party in whose favor it is entered has not preserved evidence to sustain it, either by a certificate of evidence or by the recitals in the decree.

2. CLOUD ON TITLE—*proof of allegation of possession by complainant is material.* If the jurisdiction of the court to entertain a bill to remove a cloud from title is based upon the fact of complainant's possession at the time of filing the bill, such possession must be alleged and proved; and if the decree makes no finding as to possession, and there is no certificate of evidence, a decree in favor of the complainant must be reversed.

3. SAME—*essentials of decree canceling tax deed as a cloud.* A decree canceling a tax deed as a cloud should provide that the complainant pay the sum awarded to the defendant for taxes, interest and costs within a fixed time, and that in default of such payment the bill should be dismissed.

4. EQUITY—*allegations not admitted nor denied must be proved.* If a material averment in a bill in chancery is neither admitted nor denied it must be supported by proof.

APPEAL from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

This is a bill, filed on February 1, 1901, by appellee against appellant for the purpose of removing a tax deed, as a cloud upon title, and declaring the same to be void. The bill represents that the complainant is the owner in fee simple of block 8 in Cratty & Bleyer's subdivision, etc.; that complainant is in sole and exclusive possession by his tenants; that on September 6, 1899, there was recorded in the recorder's office of Cook county a tax deed, executed by the county clerk of that county, pretending to convey to Jacob Glos said block 8 under a sale for delinquent taxes, made on September 17, 1896; that said deed recited, that it was issued in accordance

with certain affidavits and notice of the time of expiration of redemption from said sale; that there is on file in the office of the county clerk a notice and affidavit, constituting the evidence, upon which said deed was issued, copies of which are attached as an exhibit to the bill, and made a part thereof; that said affidavit and notice are void, and not in compliance with the statute; that, at the time of the alleged service of said notice, and prior thereto, Minnie Bleyer and complainant, Josiah Cratty, were residents of Chicago and owners of said block; that notice was not served upon either of them; that the real estate, described in the notice and certificate of sale, is not the same as that described and conveyed by the tax deed; that there were certain trust deeds executed, conveying said premises to certain trustees to secure the payment of certain notes; that, at the time of the service of notice, the said trustees, holders of said notes, were residents of Chicago, but that no notice was served upon them and no affidavit was made stating that upon diligent inquiry they could not be found in Cook county; that no publication was made as to unknown owners; that for these reasons said notice and certificate of sale and tax deed are void; that complainant endeavored to effect a redemption and made an offer, and in his bill offers, to pay the amount paid by Glos at such sale with subsequent taxes with legal interest, and to do what should be adjudged to be reasonable in the way of compensation to said Glos. Appellant filed a demurrer to the bill, which was overruled, and then filed an answer, denying all the allegations of the bill, including a denial that complainant was in possession of the premises described in the bill. Replication was filed to the answer.

Subsequently, by leave of court, an amendment was filed to the bill setting up that the process for the sale, upon which said tax deed was based, was invalid and illegal, and that said tax deed was void for that reason. The bill as amended was demurred to, and the demurrer

was overruled. Thereupon, appellant filed an answer, denying the allegations set up in the amendment. Replication was filed to the answer to the amended bill.

On December 16, 1901, the court rendered a decree wherein, after reciting that the cause was heard upon the bill and amendment thereto, and upon the answers and replications and the proof taken in the case, it was found that the sale of block 8, etc., made on September 17, 1896, for the delinquent taxes for the year 1895 and costs and interest thereon, was null and void; and in the decree it was ordered that the tax deed, made on September 1, 1899, by the county clerk to appellant in pursuance of said sale, should be set aside, and declared null and void, as a cloud upon appellee's title, and that appellant should deliver up the deed to be canceled by the clerk of the court.

It was further ordered that appellee should pay to the appellant the sum of $24.47, paid by the appellant on September 17, 1896, as such delinquent tax, interest and costs thereon, together with interest on the total amount from September 17, 1896, at the rate of five per cent per annum until paid. The foregoing findings and orders constitute the whole of the decree entered in the case. The present appeal is prosecuted from such decree.

ENOCH J. PRICE, for appellant.

WILLIAM H. DUVAL, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In this case there is no certificate of evidence in the record, and the evidence has not been preserved by any findings in the decree, or depositions, or master's report. It devolves upon the party, in whose favor a decree in chancery is rendered, to preserve the evidence that will sustain the decree; or the decree itself must find that

facts were proven, which will sustain it. Where no facts are found in the decree, and there is no certificate of evidence, there is nothing in the record to sustain the decree, and hence there is error which requires a reversal of the decree. (*Glos* v. *Beckman*, 168 Ill. 74; *Davis Paint Co.* v. *Metzger Oil Co.* 188 id. 295). The bill alleges that the complainant is in possession of the premises. A bill to remove a cloud from title can only be maintained where the complainant is in possession of the premises, or where the premises are vacant and unoccupied. If the jurisdiction of the court is based upon the fact, that at the time of the filing of the bill the complainant is in possession of the property, the bill must allege such possession, and the complainant must prove it. (*Glos* v. *Kemp*, 192 Ill. 73). In the case at bar the bill alleges, that appellee was in possession of the premises, and the answer denies such possession. There is no finding in the decree upon the subject of possession, and there is no certificate of evidence, containing any proof as to possession. The allegation of possession is material, and, in order to sustain the jurisdiction of the court to grant the relief prayed in this bill, the possession should have been established by testimony, which was not done.

In addition to this, the decree fixes no time, within which the money for delinquent taxes and interest and costs should be paid to appellant in case the complainant should elect to make such payment and take the benefit of the decree, and makes no provision for any disposition of the bill as to appellant in case the money should not be paid. In these particulars the decree is erroneous. "The proper practice in such cases is to fix the terms, and, in case complainant declines or refuses to comply with them, to dismiss the bill." (*Gage* v. *Thompson*, 161 Ill. 403; *Farwell* v. *Harding*, 96 id. 32; *Alexander* v. *Merrick*, 121 id. 606). Where a bill is filed to set aside a tax deed, the decree should provide that the complainant pay within a time fixed in the decree the sum awarded

the defendant for his taxes, etc., paid to obtain the deed and under the deed, and should provide that, if such sum is not so paid, the bill should be dismissed. There is no such provision in the present decree.

Counsel for appellant says that certain allegations in the bill of complaint, showing certain alleged defects in the deed, are not denied in the answer, and must therefore be taken as true. This is not a correct statement of the law. Where a material averment in a bill is neither admitted nor denied by the answer, it must be supported by proof. (*Wilson* v. *Augur*, 176 Ill. 561; *Llewellin* v. *Dingee*, 165 id. 26; *Litch* v. *Clinch*, 136 id. 410; *Davis Paint Co.* v. *Metzger Oil Co. supra; Jackson* v. *Sackett*, 146 Ill. 646).

For the reasons above stated, the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

THE CITY OF CHICAGO

v.

THOMAS O'MALLEY.

Opinion filed April 16, 1902.

1. NEGLIGENCE—*when city is liable for bridge tender's negligence.* A city is liable for an injury received by a boy of tender years who was being chased off a swinging bridge by a party in the personal employ of the bridge-tender, a city employee, where the latter had directed such party to look out for the boys, and although he saw them running toward the shore began to turn the bridge, and had turned it some seven feet when plaintiff, attempting to leave the bridge, fell between it and the abutment and was injured.

2. INSTRUCTIONS—*party cannot complain of refusal of instruction stating abstract rule of law.* A party cannot complain that an instruction is refused if he has failed to make an application of the rule of law announced therein to the evidence.

City of Chicago v. *O'Malley*, 95 Ill. App. 355, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

ANDREW J. RYAN, and JAMES J. KELLY, for appellant.

SULLIVAN & MCARDLE, and WILLIAM P. HAYS, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an action on the case, begun in the circuit court of Cook county for damages for personal injuries received by appellee. Upon a trial before a jury appellee obtained a verdict of $8000, and the circuit court, on *remittitur* of $3000, entered judgment in favor of appellee for $5000. Upon appeal to the Appellate Court for the First District this judgment was affirmed, from which judgment of affirmance an appeal was taken to this court.

The declaration alleges that appellee, a minor, while upon the Erie street bridge, was injured, and charges against appellant several classes of negligence, viz.: negligently suffered the bridge and approaches to be and remain out of repair; negligently suffered the said approaches to be and remain unguarded; negligently and wrongfully operated said bridge; negligently hallooed and gesticulated at plaintiff and wrongfully caused the bridge to turn. The additional count charges the same negligence, amplifying the last two charges, thus: carelessly and negligently frightened the plaintiff and chased him from and off said bridge by hallooing at and gesticulating at said plaintiff, causing said plaintiff, then being in safety on the bridge, to attempt to run off the same while said defendant was in the act of swinging the said bridge, and the defendant, well knowing the premises, then and there carelessly and negligently continued to swing and keep said bridge in motion, whereby, etc.

It appeared on the trial that on October 24, 1893, the plaintiff, then a boy of six and one-half years of age, in company with other children of like age, was passing along, on foot, over the Erie street bridge, in the city of Chicago. This bridge was in charge of one Moriarity, a bridge-tender for appellant, and Moriarity had under him that day one O'Brien as a helper. O'Brien was not employed by appellant, but was employed by Moriarity without authority from the city, was paid personally by Moriarity and could be discharged at his will. On the morning of the accident Moriarity, who was about to turn the bridge for some repairers who had come to work upon it, requested O'Brien to "look out for the boys so they won't get hurt," and then commenced turning the bridge south. While the bridge was turning O'Brien picked up a stick, and, in the language of Moriarity, "chased the boys off the bridge." When appellee reached the end of the bridge abutting the street the bridge had then turned some five or six feet, and as he was about to step on to the sidewalk he was in some manner thrown between the bridge and the abutment, rolled between the bridge and the abutment a short distance, and fell down into the river below and sustained serious and probably permanent injuries. Moriarity saw the boys on the bridge; saw O'Brien running toward them in a threatening manner; saw all the conditions and surroundings of the boys, and saw appellee at the time he fell from the bridge. Uncontradicted testimony shows that it was Moriarity's duty to watch and see whether people got on and off the bridge safely; that it was his duty to be as careful as possible; that he had instructions from the city to look after the safety of the people while on the bridge; that there were directions by the commissioners of public works to look after the public safety, and that it was the duty of a bridge-tender, when children were on the bridge and the bridge was about to be turned, to notify them of the danger.

Two reasons are urged by appellant why the action of the Appellate Court should be reversed: First, because appellant cannot be held liable for the alleged tortious acts of the bridge-tender's employee, O'Brien, because, as in its contention, he was not a servant of appellant, and the negligence on his part is the only negligence that this record has any tendency to establish; and second, that if there is anything tending to show the negligence of Moriarity, then, even in that case, the refusal of the trial court to give instructions 21 and 22 was error. Instructions 21 and 22 are as follows:

21. "The jury are instructed that the city of Chicago is not liable for the act or conduct of persons not in its employ.

22. "The court instructs the jury that the city of Chicago is not liable for the act or conduct of its servants when such act or conduct is not within the scope of their duty."

As to appellant's first contention, the evidence shows that while it is true O'Brien was chasing the boys from the bridge, nevertheless Moriarity saw the appellee fleeing terror-stricken from the bridge. He knew, or should have known from the immature age of the children, that if the bridge should be turned the child would be placed in great danger. It was his duty, not only naturally but especially prescribed by the chairman of the board of public works of the city of Chicago, to exercise care in seeing that any one on the bridge was not placed in danger. The testimony of McCormick, a witness for the city, was that a bridge-tender should notify children of their danger, and that he should call to a boy if he thought the boy was in danger, yet Moriarity violated all these duties that he owed to appellee, and negligently, if not willfully, turned the bridge some seven feet, and placed it in such a condition that the injury to appellee almost necessarily resulted. If the acts of both combined contributed to the injury, then appellant cannot avoid liabil-

ity by showing that O'Brien was not its servant. (*North Chicago Street Railroad Co.* v. *Dudgeon*, 184 Ill. 477, and cases cited.) These, however, are questions of fact which have been determined by the Appellate Court. *North Chicago Street Railroad Co.* v. *Dudgeon*, *supra*; *Ide* v. *Fratcher*, 194 Ill. 552.

We think it was not error to refuse the twenty-first instruction, because, *first*, it stated an abstract proposition of law; and *second*, it was calculated to mislead the jury. Under the circumstances in this case, if the jury believed, from the evidence,—which they rightfully and naturally might do,—that the injury to the plaintiff was caused in part by the negligent acts of O'Brien, and although the negligent acts of Moriarity contributed to and proximately caused the injury, yet under this instruction it might lead the jury to return a verdict for the city. As before stated, the evidence shows that Moriarity knew the plaintiff was running to the end of the bridge and was liable to be hurt, and this instruction tends to draw the attention of the jury away from the acts of Moriarity and direct them to the acts of O'Brien. *Third*, the jury had a right to consider O'Brien's acts in determining whether or not Moriarity was negligent. If Moriarity had not known that the boys were threatened and were running toward the end of the bridge and were being chased by O'Brien, the acts of Moriarity might not have been such as would cause the city to respond in damages; but the very negligence of Moriarity turns upon the conduct of O'Brien at that time, of which conduct Moriarity had full knowledge. If the negligence of O'Brien, only, were set up in the declaration and were relied upon as the ground of recovery in this case, we would be disposed to the view that O'Brien was not the agent or employee of the city and that the city was not liable for his acts. But such is not the case presented by the pleadings or the evidence. Whatever was done by O'Brien was done by the direction and with the knowledge of Moriarity,

who was the agent of the city and who owed the duty to conserve the public safety in the operation of the immense and dangerous structure of which he had charge. Moriarity was controlling the movement of the bridge with the full knowledge of the acts of O'Brien and the peril of appellee, and it cannot be said, under the evidence, as a matter of fact or law, that O'Brien's acts alone were responsible for the injury. Being apprised of the danger, Moriarity owed the duty of so controlling the movements of the bridge that injury should not result. That he made no effort in this direction is entirely clear from the evidence.

As to instruction 22, it is also an abstract proposition of law, and it could not but have been misleading because the only servant of whose negligent conduct complaint is made is Moriarity, and there is no question but that he was acting in the scope of his employment. This instruction was aimed to cover O'Brien's,—not Moriarity's,—acts, and under the peculiar facts and conditions of this case, where the acts of both Moriarity and O'Brien combined to cause the injury, to refuse this instruction was not error. The very fact that it is an abstract proposition of law, with no direction to the jury how to apply the law to the facts of the case, would very likely have led them to believe that the act of Moriarity in employing O'Brien being beyond the scope of his employment, the city need not respond in damages for the joint negligent acts of O'Brien and Moriarity, even where the latter's acts were the proximate cause of the injury. A party cannot complain that an instruction is refused if he fails to make an application of the rule of law to the evidence. *Vallette* v. *Bilinski*, 167 Ill. 564.

On the whole case we think justice has been done and that there was not prejudicial error committed by the trial court in the matters complained of.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

The South Chicago City Railway Company
v.
Ellena McDonald.

Opinion filed April 16, 1902.

1. Instructions—*language of instruction construed.* An instruction holding that "the jury are the sole judges of the questions of fact in this case, and the court does not * * * intend to instruct the jury *how* they shall find any question of fact in this case," is not subject to the objection that the word "how" would lead the jury to believe they could decide the facts in any manner they saw fit, without reference to the instructions or the evidence.

2. Evidence—*when denial of a motion to exclude evidence is proper.* In an action for personal injuries, the court's denial of defendant's motion to exclude all evidence relating to the ovarian and womb troubles of the plaintiff after the birth of her last child is proper, where the evidence tends to show that such conditions were the result of plaintiff's injuries.

South Chicago City Ry. Co. v. *McDonald*, 94 Ill. App. 612, affirmed.

Appeal from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. Clifford, Judge, presiding.

Charles C. Gilbert, for appellant.

James Maher, (A. W. Browne, of counsel,) for appellee.

Mr. Justice Ricks delivered the opinion of the court:

This is an action brought in the circuit court of Cook county to recover for personal injuries alleged by the plaintiff to have been received by her on July 28, 1896, by reason of the negligent operation by the defendant of one of its street cars, near the intersection of One Hundred and Fourth street and Ewing avenue, in the city of Chicago. Her declaration is in a single count, and merely charges that she was a passenger upon a car of the defendant, and that as she, with due care, was about to

alight from the car, it was carelessly, etc., propelled and caused to be jerked, by means whereof she was thrown to the ground and injured, etc.

Plaintiff's evidence tended to prove that the car in question stopped at One Hundred and Fourth street, and that before it started again she attempted to alight therefrom, but that as she was in the act of doing so it was started with a jerk, and by reason thereof she was thrown to the ground and seriously injured. Upon a trial of the cause in the circuit court the jury returned a verdict in favor of appellee in the sum of $8500, upon which judgment was entered. Upon appeal the Appellate Court required appellee to remit $4000 and entered a judgment for the sum of $4500, and required the appellee to pay the costs in the Appellate Court, from which judgment appellant now appeals.

Two errors are urged in this court for reversal: First, the giving of appellee's instruction numbered 17, which is as follows: "The jury are instructed that they, the jury, are the sole judges of the questions of fact in this case, and the court does not, by any instructions given the jury in this case, intend to instruct the jury how they should find any question of fact in this case;" and second, the overruling by the court of the defendant's motion to strike out all evidence relating to ovarian and womb troubles of the plaintiff after September 28, 1896,—the date of the birth of plaintiff's last child,—which motion was based upon the want of connection thereof in any way with the matters complained of in the declaration.

The objection to the first of appellee's instructions is based on the word "how." It is urged that the word "how" would lead the jury to believe that they had a right to decide the facts in any manner that they saw fit, and that it vitiated all the instructions of the defendant wherein the jury were told that they could only find a verdict of guilty by the preponderance of the evidence, and unless they should likewise find that the plaintiff

used due care and was not guilty of contributory negligence; that they could not arbitrarily disregard the testimony of any witness, and that they could not allow themselves to be governed by sentiment, prejudice or sympathy in finding such facts, etc. We agree with the Appellate Court that this distinction of counsel is entirely too refined. It seems to us that the phrase "how they [the jury] should find any question of fact" was synonymous with and would be plainly understood to mean "at what conclusion they should arrive," and not the manner in which they should find any question of fact. While it is true that the instruction might be more accurately worded, we think that the plain meaning of it was as stated above.

The next objection of appellant, in regard to the exclusion of the evidence relating to the condition of appellee after the birth of her child, is not well founded. There is evidence in the record tending to show that appellee's present condition is a result of her injuries. Dr. Russell testified that he attributed appellee's present condition to the injuries that she received by being thrown from this car on July 28, 1896, and the great weight of the testimony is that prior to the injury the appellee was a perfectly well and healthy woman and that ever since that time her physical condition has been very bad. Appellee testified: "Prior to the injury I had the best of health all the time. I never knew what an ache or pain was, before. I did the washing, scrubbing, cooking, baking,—all the housework. Prior to the injury I think I weighed 205, and a year before that time my weight was from 180 to 187 pounds right along. My health since the time of the injury has been nothing but suffering. My weight since that time was 145 the last time I was weighed. I can't do anything in regard to heavy work now; just do some sewing, or do a little bit of cooking for me and the children, and little jobs like that around the house." Clearly, this was evidence to

be submitted to the jury as to whether or not her present condition is the result of the injuries received, and was a question of fact for the jury, and is not open to review in this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

JAMES M. BISHOP

v.

ALICE A. THOMPSON *et al.*

Opinion filed April 16, 1902.

1. LACHES—*there can be no laches where there is no knowledge.* Delay will not bar relief in equity against fraud, where the injured party has been ignorant of the fraud practiced upon him until shortly before commencing his proceeding.

2. SAME—*when laches in discovering fraud will not be imputed.* Where the seller takes a purchase money mortgage, which he agrees to withhold from record until the purchaser has secured a building loan, with the understanding that the purchase mortgage should be the second lien, if the seller, upon discovering that the purchaser has placed a second lien upon the property appearing of record to be valid, inquires of the mortgagor and mortgagee if the same is *bona fide* and is assured by them that it is, he is not bound to make further inquiry to avoid the imputation of *laches* in discovering the mortgage was fraudulent.

3. EQUITY—*when party is entitled to have conveyances set aside.* If the holder of a purchase money mortgage, which was to be recorded as a second lien after the purchaser had secured a building loan, learns that the purchaser has placed a second mortgage upon the property which he is assured by the parties is valid, he may purchase the mortgage for his protection, and if he discovers that such mortgage was fraudulent and without consideration, may, after the mortgaged property has been swept away by foreclosure of the building loan lien, (the mortgagor being insolvent,) come into equity to set aside his conveyance of certain property made in payment for the second mortgage, and to cancel a deed to the same from his grantee to a third party without consideration; nor is his right barred because he destroyed the worthless mortgage and note after purchasing them and before discovering the fraud.

APPEAL from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

ROSENTHAL, KURZ & HIRSCHL, for appellant.

FREDERIC R. DEYOUNG, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The superior court of Cook county sustained appellees' demurrer to the amended bill of appellant, in which he prayed the court to set aside a deed made by him to the appellee Louis A. McDonald, and a deed from said McDonald to the appellee Alice A. Thompson. The bill was then dismissed by the court at the cost of appellant.

The criticisms of counsel for appellees upon the form and manner of statement employed in the bill seem to be deserved. The rules of equity pleading require a clear and orderly statement of the facts relied up as a ground for the relief sought, so that the facts alleged may be readily understood and put in issue. The bill in this case, with its two amendments, does not conform to such rules, but presents a rather confused statement of facts and conclusions. But we find in it the following statements of fact admitted by the demurrer to be true: The complainant, James M. Bishop, being the owner of certain real estate in Cook county, sold and conveyed the same to the defendant Alfred L. Ward for the consideration of $3600, by deed dated August 3, 1891, and recorded October 2, 1891. Complainant agreed to take a purchase money mortgage to secure $3400 of the price, and to withhold his mortgage from record until Ward could borrow money to improve the premises by making a building loan secured thereon. The building loan was to be the first encumbrance and complainant's mortgage the second. Ward obtained a building loan secured on the property to the amount of $6600, and notified complainant. Ward also executed a mortgage of the premises to the defendant Louis A. McDonald for $3000, dated in August, 1891, and recorded October 2, 1891. This mortgage was made in violation of the agreement between

Ward and the complainant and in fraud of complainant's rights, and was without consideration. This fraudulent mortgage appeared on the record to be a second lien on the premises. Complainant, on receiving notice that the building loan had been effected, without examining the records filed his mortgage for record October 8, 1891, which was the third lien. In April, 1892, complainant first learned of the intermediate mortgage to McDonald, and the defendants Ward and McDonald then represented to him that said mortgage was made in good faith and was valid, and represented an actual indebtedness of Ward to McDonald. The complainant, relying on such representations, purchased the mortgage from McDonald and deeded to him in payment therefor certain real estate in said county of the value of $3000. McDonald thereupon, by a deed dated May 28, 1892, conveyed the property received from complainant, without any consideration, to the defendant Alice A. Thompson, a daughter of Ward. The building loan mortgage was foreclosed and swept away the property conveyed to Ward, and the subsequent mortgages became utterly worthless and the mortgage received from McDonald was destroyed. Ward, the maker of the notes and mortgage to McDonald, was wholly insolvent when they were made and has so remained to the present time. The title to the property conveyed to McDonald, and by him conveyed without consideration to Alice A. Thompson, remains in her. The complainant, by his bill, offered to re-pay any taxes or expenditures on the property and to execute an assignment of the notes and mortgage which were destroyed, and give such indemnity against them as the court might decree.

The principal objection to the bill urged by counsel is, that the complainant was guilty of *laches* which should bar relief in equity. A court of equity will not aid a party guilty of unreasonable delay in asserting his rights. After one who has been defrauded has obtained knowl-

edge of the fraud or learned facts or circumstances from which knowledge would be imputed to him, he must act promptly in asking the aid of the court. There is no *laches*, however, where there is no knowledge, and delay will not bar relief where the injured party has been ignorant of the fraud. The duty to commence proceedings can arise only upon the discovery of the fraud. (Pomeroy's Eq. Jur. sec. 917.) In this case, the complainant inquired of the maker and holder of the encumbrance, and they both asserted it was valid; that it was given in good faith, and that it represented an actual indebtedness. From the public records the mortgage appeared to be valid, and presumably no one except the parties to the transaction would know to the contrary. Complainant knew of the fraud of Ward in making the mortgage to McDonald, but he had no reason to suppose that McDonald was engaged with Ward in defrauding him, or that Ward had been guilty of any further wrong than interpolating the mortgage on the records so as to give McDonald a preference. There was no other apparent source of information than the parties to the mortgage, and, of course, complainant was not required to make general inquiry among people who presumably knew nothing about the facts. No fact or circumstance is stated from which complainant would be charged with notice of the fraud, or which ought to have given rise to suspicion or belief that he had been defrauded. He first learned the facts on July 19, 1901, when he was applied to in behalf of Ward to make a deed for the correction of the deed to McDonald, and he filed the bill in this case July 24, 1901. He was not guilty of *laches*.

Counsel further say that whether or not there was a consideration for the mortgage to McDonald was of no consequence to complainant, and that he was in no way affected by it. His property to the amount of $3000 was obtained by means of the fraudulent and worthless mortgage and the fraudulent representations of the defend-

ants Ward and McDonald. It is true that Ward and McDonald would have been estopped by their false representations to complainant, and if the mortgaged premises had been of sufficient value to pay all the mortgages, complainant would have been reimbursed the amount of which he was defrauded, and, in the end, would have suffered no damage. The mortgaged property, however, was not worth more than the building loan when it matured and the McDonald mortgage had no value as an encumbrance, so that complainant's loss by the fraud was the value of the property he conveyed. The maker of the notes was insolvent and worthless when they were made, and has been so ever since.

It is also urged that the complainant can have no relief because he cannot put McDonald *in statu quo*, the notes and mortgages having been destroyed. They were absolutely worthless in McDonald's hands, and their restoration would not benefit him in any way. He could not maintain any action on them against anybody, and suffered no injury by their not being restored. Complainant offered to execute an assignment or give any indemnity against them that the court might require, and he could not be barred of his remedy because he had, in ignorance of the fraud, destroyed the worthless papers. It appears from the averments of the bill that McDonald was merely used to accomplish the fraud, and that he conveyed the premises immediately, without consideration, to the daughter of Ward. As she parted with nothing there is nothing to be restored to her, and complainant offered to recompense her for all taxes paid or expenditures on the property.

We think sufficient facts were stated in the bill to call for the relief prayed for and that the demurrer should have been overruled. The decree of the superior court is reversed and the cause is remanded to that court, with directions to overrule the demurrer.

Reversed and remanded.

FRED SCHROEDER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed April 16, 1902.

1. ROBBERY—*conviction may be sustained though proof of character and denominations of money are not strict.* The gist of the crime of robbery is the force or intimidation and the felonious taking from the person of another money or other thing of value against his will, and hence a conviction will not be reversed although the proof of the character and denominations of the money taken might not be sufficient to sustain a conviction for larceny.

2. SAME—*when conviction will not be reversed as against the weight of evidence.* A conviction of the crime of robbery, based upon the identification of the accused as complete and unequivocal as one witness could make it, will not necessarily be reversed because three witnesses testified to facts tending to establish an *alibi.*

3. SAME—*when conviction will not be reversed for improper conduct of prosecuting attorney.* If the evidence, under proper instructions, is sufficient to sustain a conviction of the crime of robbery, the persistent attempts of the assistant State's attorney, in cross-examining the accused to show, notwithstanding the adverse rulings of the court, that the accused was living in an open state of adultery with the woman with whom he boarded, is not ground for reversal, where the rulings of the court were correct.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

SAMUEL H. TRUDE, for plaintiff in error.

CHARLES S. DENEEN, State's Attorney, and F. L. BARNETT, for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

This writ of error was sued out to reverse a judgment of conviction of plaintiff in error for the crime of robbery. The prosecuting witness, Henry Millhouse, testified that on the morning of the fourth day of October, 1901, about ten minutes before five o'clock, soon after he had opened his saloon, he saw plaintiff in error coming across the

room toward the bar, and another man, whom he was unable to identify, standing in the doorway; that witness went behind the bar as if to wait on them as customers, and when plaintiff in error also started to come around the bar, witness met him at the end of the bar and took hold of him, when the plaintiff in error presented his revolver, first at his body and then at his head, and told him to stand there; that he obeyed, and plaintiff in error then stooped down behind the bar and took $120 in money from a cigar-box, where it was kept; that the man at the door also pointed a revolver at him; that the men had handkerchiefs tied over the lower part of their faces, and when plaintiff in error stooped to get the cigar-box containing the money, the handkerchief came down partly off of his face, so that he was able to identify him; that the plaintiff in error had been in his saloon two or three times a few weeks before, and once when the witness was making change and taking money from the cigar-box the plaintiff in error was standing at the bar. The witness positively identified the plaintiff in error as the robber who took the money but could not identify the one who stood at the door. There was no other evidence offered by the People.

Plaintiff in error, as a witness in his own behalf, testified that he had been in Millhouse's saloon a few times, but that he was not there when any money was taken, and never took any money from there, as testified to by Millhouse; that on the morning of the alleged robbery he was at home in bed, and did not get up that morning until nine o'clock; that he was at the woman's house where he was boarding, and was not out of her house that morning until after nine o'clock. She, and her daughter, thirteen years of age, and her son, older than the daughter, gave similar testimony. The son testified that he slept in the same bed with plaintiff in error, and got up about twenty minutes after five that morning, leaving him in bed, and that after eating his breakfast he went

to his work. Three witnesses testified that plaintiff in error had always borne a good reputation for honesty.

It is first assigned as error that the court should have granted a new trial because the verdict was against the weight of the evidence. If that question depended on the number of witnesses testifying for or against the accused the error might be well assigned. But it does not, and the jury and court below having seen and heard the witnesses testify, had far better opportunities than we have to judge of their credibility. It seems clear that the witness Millhouse had a good opportunity to see, and every reason to remember, the robber whom he took hold of, and who put him in fear of his life by presenting at close range a revolver while he took his money. He had seen the plaintiff in error in his saloon before,—once at the bar while he was making change from money in the cigar-box,—and his identification was as complete and unequivocal as the testimony of any one witness could make it. It was for the jury to determine whether the witness was worthy of belief or was or was not mistaken.

It is urged that although the character and denominations of the money taken were alleged specifically in the indictment, these allegations were not proved on the trial. While the indictment did so allege, it also contained allegations that the money taken consisted of national bank bills of divers national banks and United States treasury notes of divers denominations unknown to the grand jury, but alleging their value. It is not important to consider whether the proof was sufficient on this point to sustain a conviction for larceny. But the gist of the crime of robbery is the force or intimidation, and the felonious taking from the person of another, money or other thing of value against his will. (Crim. Code, sec. 246; *Burke* v. *People*, 148 Ill. 70.) We think that the proof made was sufficient as to the kind and value of the money taken to sustain the conviction for robbery. *Keating* v. *People*, 160 Ill. 480.

The most serious question arises on the alleged misconduct of the assistant State's attorney in persistently attempting, on cross-examination of the defendant when a witness in his own behalf, notwithstanding the adverse rulings of the court, to show or make it appear that the defendant had been living in an open state of adultery with the woman with whom he boarded. The court held the questions to be improper, and that the State could not lawfully procure a conviction of the defendant for one crime by proving another having no connection with it. The rulings of the court were entirely correct and no error was committed by the court. The only danger to the proper administration of justice in the particular case lay in the attempts of the attorney for the People, by his questions, asked in different forms but tending to elicit the same improper proof, and by improper remarks in connection therewith, to prejudice the jury against the defendant. The court should have summarily put an end to the line of inquiry pursued. But we must credit the jury with fair intelligence, and as the evidence, under proper instructions given by the court, was sufficient to warrant the finding of the defendant guilty, we do not regard it as our duty to set the conviction aside. We cannot say from the record that the misconduct of counsel complained of proceeded so far beyond proper bounds as to justify a reversal on that ground.

Complaint is also made of an instruction given at the instance of the People, which informed the jury of the nature and bearing of circumstantial evidence, and which stated that if the facts and circumstances shown by the evidence were sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the defendant, then such evidence was sufficient to authorize a verdict of guilty. The point made against this instruction is, that there was no circumstantial evidence in the case. It was a circumstance to be taken into account with the other facts, that the defendant was, if the jury so believed, in

the saloon of the prosecuting witness a week or two before the robbery and saw how and where Millhouse kept his money. This and others were proper, at least in connection with the fact of identification. We see no error in the instructions.

The judgment must be affirmed.

Judgment affirmed.

W. B. TOPLIFF *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 16, 1902.

1. MUNICIPAL CORPORATIONS—*city council may designate portions of street for roadways.* A city council has power to designate portions of the streets to be used for roadways and other portions to be used for sidewalks.

2. SAME—*city council not required to improve full width of roadway.* The city council has power to improve so much of the roadway in width as it may deem necessary for the use of the public.

3. SPECIAL ASSESSMENTS—*when general ordinance fixing width of sidewalks is admissible.* Where it is claimed that an improvement ordinance requiring the roadways of intersecting streets to be curbed and paved between the street lines of the street to be improved is uncertain in description because certain of such roadways have not been made, it is competent to introduce a general ordinance establishing the width of sidewalks in streets of specified widths, for the purpose of showing width of roadways therein.

4. SAME—*court must accept evidence in record as to benefits.* The Supreme Court cannot arbitrarily say that property at an equal distance on either side of the street to be improved is equally benefited by the improvement, but must accept the proof which appears in the record as correct upon that point.

APPEAL from the County Court of Cook county; the Hon. GEORGE K. INGHAM, Judge, presiding.

SAMUEL J. HOWE, for appellants.

WILLIAM M. PINDELL, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal from the judgment of the county court of Cook county confirming a special assessment levied to pay the cost of curbing, grading and paving with granite top macadam One Hundred and Fifteenth street, from Michigan avenue to Wentworth avenue, in the city of Chicago.

Section 1 of the ordinance provides that "the roadway of One Hundred and Fifteenth street from the west line of Michigan to the east curb line of Wentworth avenue, said roadway being thirty-eight feet in width, and also the roadways of all intersecting streets and alleys extended from the curb line to the street line produced on each side of said One Hundred and Fifteenth street between said points, * * * be improved," etc.; and later in the same section is the following provision: "And the best quality of sandstone curb-stones shall be set on edge along their length on each side of the roadways of all intersecting streets and alleys extended from the curb line to the street line produced on each side of said One Hundred and Fifteenth street between said points."

In support of an objection that the ordinance was insufficient in matter of description, it was proven the roadways of certain of the streets which intersected One Hundred and Fifteenth street had not been made and that said streets had not been curbed. This proof was produced to show that the width of the roadways of the intersecting streets which were to be curbed and paved at the intersections had not been established and could not be ascertained. The city, however, produced in evidence, against the objections of the appellants, section 1814 of the Municipal Code of the city of Chicago, as follows: "All sidewalks which may hereafter be ordered by the city council shall be constructed under the superintendence and to the satisfaction of the department of public works, and shall be of the width herein specified,

unless a different width shall be specified in the order, to-wit: On all streets which are one hundred feet wide and upward, twenty feet; on streets eighty feet and upward in width, sixteen feet; on streets sixty-six feet and under eighty feet in width, fourteen feet; on streets sixty feet and under sixty-six feet in width, twelve feet; on streets fifty feet and under sixty feet in width, ten feet; on streets sixty feet and more than fifty feet in width, ten feet; and on streets less than fifty feet and more than forty feet in width, six feet; and on streets thirty feet and less than forty feet in width, four feet. When built of full width, a substantial curbing of stone or white oak plank not less than three inches in thickness, well tied in, shall be laid on the outer edge of the sidewalk." The engineer of the board of local improvements testified that with the aid of this section of the code all uncertainty as to the width of the roadways of the intersecting streets was removed. Appellants also objected to this testimony of the engineer, and now contend it was error to admit it, and also error to admit the ordinance which furnished the basis for it, and further argue that, even if admissible, the width of the roadways of the intersecting streets are not thereby definitely established.

We think section 1814 of the Municipal Code competent testimony. The city council has ample power to designate portions of the streets of the city to be used by horsemen and vehicles and other portions to be used by pedestrians. (*Kohlhof* v. *City of Chicago*, 192 Ill. 249; *City of Bloomington* v. *Bay*, 42 id. 503.) That portion intended for the use of horsemen and vehicles is usually and properly known as the roadway of the street, and the other portions of the streets are not improperly known as the sidewalks,—that is, spaces reserved for pedestrians to walk upon on either side of the roadway. The "curb line" of a street is the dividing line between that portion of the street to be used by horsemen and vehicles, called the roadway, and that portion of the street re-

served on each side of the roadway for the use of pedestrians. Though the roadway of the intersecting streets in question had not been improved by grading or paving, yet the requirements of section 1814 of the Municipal Code would enable any civil engineer, or even persons lacking in the technical knowledge of engineering, to determine the boundary lines of that portion of the street designated to be occupied as the roadway of the street, and those lines would be the "curb lines" of the street.

The ordinance in question provided for the improvement of such roadways of such intersecting streets produced into the intersection of the streets, from the street line of One Hundred and Fifteenth street to the curb line, or line of the roadway, of One Hundred and Fifteenth street. There was proof that sidewalks laid along some of the intersecting streets were of less width than was required by section 1814 of the code, and also testimony tending to show that the city had ordered the roadways of State street and Perry avenue,—two of the streets which intersect One Hundred and Fifteenth street,—to be paved, and that the pavements so ordered to be made did not cover all the space between the sidewalk spaces as established by section 1814 of the said code; but it was further proven the sidewalks referred to had not been built by the city but by the proprietors of the land which had been subdivided, and the fact the city had determined not to improve the roadway of those streets throughout the full width of the space intended to be devoted to the uses of a roadway, had no effect to repeal the provisions of section 1814. It is within the discretion of the city council, in constructing a walk on that portion of the street reserved for pedestrians, to build the structure only of that breadth that it shall deem necessary, and the city council has the same power and discretion when improving the roadway of a street. (*Murphy* v. *City of Peoria*, 119 Ill. 509.) Only so much in width of the roadway may be improved as the city

council may deem necessary to be so fitted for the use of the public.

Property to the distance of four hundred and thirty-nine feet south from One Hundred and Fifteenth street was assessed as being benefited by the improvement while no property was assessed as being benefited beyond the distance of one hundred and twenty-five feet north of the proposed improvement. It is insisted that property beyond the distance of one hundred and twenty-five feet north of One Hundred and Fifteenth street must have been benefited by the proposed improvement in like manner as property more than that distance south of One Hundred and Fifteenth street, and upon this insistence is based the complaint that the property north of and within four hundred and thirty-nine feet of One Hundred and Fifteenth street has been omitted from the assessment, to the injury of the appellants. Appellants produced no testimony to the effect that the improvement benefited property north of One Hundred and Fifteenth street beyond the distance of one hundred and twenty-five feet. The only testimony upon this point was that of a witness for the appellee city, and his conclusion was adverse to the contention of the appellants. We cannot arbitrarily declare that the improvement must have benefited the property to an equal distance upon either side of One Hundred and Fifteenth street, but must accept the proof which appears in the record as being correct upon the point.

The testimony as to the extent to which the property of the appellants will be benefited by the improvement of the street is quite conflicting. That of the witnesses in behalf of the appellee city, standing alone, amply supports the judgment, while that produced in behalf of the appellants, standing alone, would establish that the benefits to the property were but little more than half of the sums which the lots were adjudged to pay. The question was one resting wholly in the opinions of the different

witnesses, and the appearance of the respective witnesses while on the stand, their manner of testifying and their apparent intelligence and judgment, had very much to do with the weight to be accorded to the opinions expressed by them. These considerations, and the fact that we are not authorized to interfere with a finding of this nature unless we can say that it is palpably against the weight of the evidence, must lead us to a judgment of affirmance. This is true even in cases where, if governed wholly by the testimony as written in the record, we might feel better satisfied with a different conclusion.

Some complaint is made as to the rulings of the court on objections as to the admissibility of evidence, but with one exception, hereafter noticed, counsel do not cite us to the page of the abstract where the subject matter of the complaints can be found. The statements and discussion in the brief of counsel disclose the alleged errors related in the main to matters of merely collateral interest and altogether of minor importance, and such as could not constitute error reversible in character. The objection which the citation in the abstract aids us to examine is, that the appellant Topliff, after having, as a witness in his own behalf, testified that in his opinion he could not sell his property for any greater sum after the completion of the improvement of the street than before, added that his experience was that other improvements which had been put in in that vicinity had not increased the value of his property, and that the court ordered that his expression as to his experience of the effect of other improvements should be stricken from his testimony. We do not so understand the abstract. It appears from the abstract that after making the statement as to his experience, etc., the witness said, "I am willing to pay $50 a lot for the general public," and it was this latter remark of the witness which was stricken out.

The judgment must be and is affirmed.

Judgment affirmed.

EZRA KENDALL

v.

WILLIAM H. WEST.

Opinion filed April 16, 1902.

1. TRIAL—*duty of court to instruct jury where the facts are admitted.* In an action by a theatrical performer against the manager of the company for terminating the contract of employment, if the facts are admitted it is the duty of the court to instruct the jury whether or not such facts, in law, amount to a legal justification of the plaintiff's discharge.

2. CONTRACTS—*contract to render "satisfactory services" means satisfactory to the employer.* If a theatrical performer contracts with the manager of a company to render "satisfactory services," the manager, if dissatisfied, may discharge the performer for any reason which he may deem sufficient, where there is no provision in the contract in any manner limiting the manager in the exercise of his judgment as to what shall be deemed "satisfactory services."

Kendall v. *West*, 98 Ill. App. 116, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. HILSCHER, Judge, presiding.

PURNELL & TERWILLIGER, for appellant:

On a contract by a corporation to purchase certain goods subject to inspection and approval by its agent, the corporation is liable if the agent fraudulently disapproves of the goods. *Lynn* v. *Railroad Co.* 60 Md. 404.

A party is bound to be satisfied where he has no ground to be dissatisfied. He is bound to act honestly and test the property fairly, with such fair trial as the seller has a right, under the circumstances, to expect he would give, and herein to exercise such judgment and capacity as he has, when by the contract he is the one to be satisfied and not another for him. If he does this and is still dissatisfied, and that dissatisfaction is real and not feigned, it is enough. *McClure* v. *Briggs*, 58 Vt. 82; *Hartford S. Manf. Co.* v. *Brush*, 43 id. 528; *Daggett* v. *Johnson*, 49 id. 345.

An unfounded dissatisfaction is no defense. *Duplex Boiler Co.* v. *Garden*, 101 N. Y. 387; *Brooklyn* v. *Railroad Co.* 47 id. 475; *Foillard* v. *Wallace*, 2 Johns. 395.

A just claim, under a contract for services which provides that the work shall be done to the entire satisfaction of the other party, cannot be defeated by the latter by arbitrarily and unreasonably saying he is not satisfied. *Dall* v. *Noble*, 116 N. Y. 230.

If the work was performed by the plaintiff in accordance with the other provisions of the contract, in his best and skillful-like manner, the defendant could not refuse to pay by unreasonably and in bad faith saying the work was not done to his satisfaction. *Smith* v. *Alker*, 102 N.Y. 87; *Bank* v. *New York*, 63 id. 336; *Nolan* v. *Whitney*, 88 id. 648; *Woodward* v. *Fuller*, 80 id. 312; *Phillip* v. *Gallant*, 62 id. 256; *Johnson* v. *DePeyster*, 50 id. 666; *Thomas* v. *Fleury*, 26 id. 26; *Smith* v. *Brady*, 17 id. 189; *Wyckoff* v. *Meyers*, 44 id. 145; *United States* v. *Robeson*, 34 U. S. 328; *Smith* v. *Wright*, 4 Hun, 652; *Whitman* v. *New York*, 21 id. 121.

Wherever a contract involves considerations of the operative's fitness, or any considerations which are not strictly personal in their nature but are capable of being understood and appreciated by others, then, and in all such cases, the promisor undertakes that he will act reasonably and fairly, and found his determination on grounds that are just, reasonable and sensible. In this class of cases his decision in point of correctness is subject to review by judicial triers. *Duplex Boiler Co.* v. *Garden*, 101 N.Y. 387; *Foillard* v. *Wallace*, 2 Johns. 395; *Machine Co.* v. *Smith*, 50 Mich. 565; *Brooklyn* v. *Railroad Co.* 47 N.Y. 475; *Burns* v. *Munger*, 45 Hun, 75; *Grimell* v. *Kiralfy*, 55 id. 422; *Dall* v. *Noble*, 116 N.Y. 230; *Wender* v. *Klow*, 42 id. 675; *Hydecker* v. *Williams*, 45 id. 637.

In all cases the dissatisfaction must be real and not pretended, and must be honestly entertained, in good faith. *Exhaust V. Co.* v. *Railway Co.* 66 Wis. 218; *Hartford S. Manf. Co.* v. *Brush*, 43 Vt. 528.

BULKLEY, GRAY & MORE, for appellee:

The contract of employment, for the alleged breach of which appellant brought his suit, obligated appellant to render to appellee satisfactory services. Therefore, if the services rendered were not satisfactory, appellee had the right to dispense with them without further liability for the unexecuted portion thereof. *Tyler* v. *Ames*, 6 Lans. 280; *Wood Machine Co.* v. *Smith*, 15 N. W. Rep. 906; *Koehler* v. *Buhl*, 54 id. 157; *Frary* v. *Rubber Co.* 53 id. 1156; *Teichnor* v. *Pope Manf. Co.* 83 id. 1031; *Crawford* v. *Publishing Co.* 57 N. E. Rep. 616; *Goodrich* v. *VanNortwick*, 43 Ill. 445; *Campbell Printing Press Co.* v. *Thorp*, 36 Fed. Rep. 414; *Alexis Stoneware Co.* v. *Young*, 59 Ill. App. 226; *McClure* v. *Briggs*, 58 Vt. 82.

As a matter of law, the record in this case establishes justification on the part of appellee for the discharge of appellant. Wood on Master and Servant, sec. 119, and cases cited; *Peniston* v. *Huber*, 46 Atl. Rep. 934; *Leatherberry* v. *Odell*, 7 Fed. Rep. 646.

Appellant having, after his discharge, earned and been paid by other like employment a greater sum than he would have received had he remained in the employ of appellee, under his contract, to the end of the term, has no cause of action under the first count of the declaration, which claims damages for a wrongful discharge. *Trustees* v. *Shaffer*, 63 Ill. 243; *Moline Plow Co.* v. *Booth*, 17 Ill. App. 574; *Mt. Hope Cemetery Ass.* v. *Weidenmann*, 139 Ill. 67; *St. Bernard* v. *Rieg*, 13 Ohio Cir. Ct. 540.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an action of assumpsit brought in the circuit court of Cook county by the appellant, against the appellee, to recover damages in the sum of $10,000 for the breach of a contract in writing, whereby the appellee, a theatrical manager, engaged the appellant, a specialist in monologue, to perform for appellee at such places and theaters in the United States and Canada as appellee

might require, for the theatrical season of 1898 and 1899, the season to begin on or about August 15, 1898, and continue for not less than thirty weeks. Appellant agreed to "render satisfactory services," and appellee agreed to pay for "satisfactory services" the sum of $250 per week. Appellant entered upon his engagement on August 15, and continued until November 5, 1898, when the contract was terminated by appellee. Appellant was paid for his services in full, up to and including November 5. The case was tried by the court and a jury. At the close of all the evidence the court peremptorily instructed the jury to find for the defendant, and a motion for a new trial having been overruled and judgment rendered on the verdict, the appellant perfected an appeal to the Appellate Court for the First District, where the judgment of the circuit court was affirmed, and a further appeal has been prosecuted to this court.

The question presented for decision is, did the circuit court err in taking the case from the jury? There was no conflict in the evidence, and the facts being admitted, it was the duty of the court to direct the jury as to whether or not such facts, in law, amounted to a legal justification for the discharge of the appellant. The company managed by appellee was a minstrel company. The appellant was requested by appellee a number of times to shorten the time of his performance and to try his part in black face, with both of which requests he positively declined to comply. Wood, in his work on Master and Servant, (sec. 119,) says: "Refusing to obey the reasonable orders of the master is a good ground for discharge from service, for in every contract of hiring there is an implied contract on the part of the servant that he will obey the lawful and reasonable commands of his master." The appellee was the proprietor of the company and had the right to direct its management, and if appellant refused to comply with his reasonable request the appellee had the right to discharge him. We do not

think the court erred in holding, as a matter of law, that the request made of appellant to shorten the time of his performance and to try his part in black face, under the circumstances shown by the undisputed testimony, was not unreasonable, arbitrary or capricious, and that he was bound to comply therewith, and upon a refusal so to do that the appellee had the right to discharge him and terminate the contract. The contract of employment provided that appellant should render "satisfactory services," for which he was to receive the sum of $250 per week. It contained no provision in any manner limiting the appellee in the exercise of his judgment as to what should be deemed "satisfactory services." The appellant did not undertake to render services which should satisfy a court or jury, but undertook to satisfy the taste, fancy, interest and judgment of appellee. It was the appellee who was to be satisfied, and if dissatisfied he had the right to discharge the appellant at any time for any reason, of which he was the sole judge. (*Goodrich* v. *VanNortwick*, 43 Ill. 445; *Crawford* v. *Mail and Express Publishing Co.* 57 N. E. Rep. 616.) In the *Goodrich case* the plaintiff purchased and paid for a fanning mill, with the agreement that if it did not suit him and answer his purpose he might return it within thirty days. It was held that the mill must answer both requirements, and if it did not suit the purchaser he had the right to return it and recover back the purchase price, and that he was the sole judge of whether or not he was suited. In the *Crawford case* the plaintiff made a contract to write for the defendant's newspaper for two years, provided his services should be satisfactory to the publisher, and it was held that the defendant had the right to discharge the plaintiff at any time if his services were unsatisfactory, of which fact the defendant was the sole judge.

We find no reversible error in this record. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

EMMA N. ROSE

v.

THE CITY OF FARMINGTON.

Opinion filed April 16, 1902.

1. HIGHWAYS—*what essential to establish a way by prescription.* In order to establish a way by prescription the use of the way must have been adverse, exclusive, continuous and uninterrupted for a period of twenty years, and with the knowledge of the owner of the land over which the way is claimed.

2. SAME—*way by prescription must be shown to have been used under claim of right.* To create the presumption of a grant of a right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that it was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it without regard to the wishes of the owner, and that it has not been regarded by the parties merely as a license, revocable at the pleasure of the owner.

3. SAME—*owner may testify as to what his intention was.* While the acquiescence of the owner of the fee may be shown by his acts, yet he may testify as to what his intention was, and such testimony is to be considered in connection with all the other facts and circumstances of the case.

APPEAL from the Circuit Court of Fulton county; the Hon. JOHN A. GRAY, Judge, presiding.

CHIPERFIELD & CHIPERFIELD, for appellant.

FREDERICK M. GRANT, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill for an injunction, filed in the circuit court of Fulton county by appellant, Emma N. Rose, to enjoin the appellee, the city of Farmington, from closing or obstructing a certain alleged private way claimed by her as an easement over a lot belonging to the appellee. There was a hearing before the court, which resulted in a decree denying the relief prayed for. From this decree the complainant took this appeal.

It appears that appellee is the owner of a lot in the city of Farmington lying south and west of appellant's premises, and that appellant claims a right, by prescription, to use the north twelve feet of appellee's lot as a driveway to get to that part of her premises lying east of appellee's lot. Appellee was about to erect on its premises a building which would cover the whole of this strip claimed as a driveway by appellant.

In order to establish a way by prescription the use and enjoyment of what is claimed must have been continued for a long period, to-wit, twenty years. It must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land in or over which the easement is claimed. The adverse use which will give title, by prescription, to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to the land in fee. (Washburn on Easements, 131; 19 Am. & Eng. Ency. of Law, 11; *City of Chicago* v. *Chicago, Rock Island and Pacific Railway Co.* 152 Ill. 561.) The adverse possession which is required to constitute a bar to the assertion of a legal title by the owner of it must include these five elements: It must be (1) hostile or adverse; (2) actual; (3) visible, notorious and exclusive; (4) continuous; and (5) under a claim or color of title. *Zirngibl* v. *Calumet Dock Co.* 157 Ill. 430.

In the case at bar there seems to be no controversy as to the fact that appellant and her predecessors in the title and occupation of the premises now owned by her, traveled over and used the strip in question as a driveway. Appellant's grantor, Mrs. Katherine Davis, testified that she never had the consent of any one for the purpose of using this roadway, and that there has never been any obstruction of any kind upon it. George Woodruff, the grantor of the last witness, testified that during the time he used it there were no objections raised from any source, neither did he at any time obtain anybody's

consent to its use. The driveway was not mentioned in any of the deeds to the premises. He never asked permission to use it—never claimed to own it. He said nothing to anybody and the owner said nothing to him. The alleged driveway seems to have been used there as early as 1872. Jotham Crane, who owned the lot now belonging to appellee from 1885 on, testified that this alleged way had been used by some persons to reach the Masonic and Odd Fellows' Hall, and a store, and certain coal houses on the next lot. Crane testified that while he owned the lot he had several talks about it with Mr. Dunn, appellant's father, who lived with her, and witness told him just as long as he owned or controlled the lot he would let him go across it; that he never talked about it with Woodruff or Mrs. Davis; that they used it as an accommodation; that nobody had any right to use it except those spoken of; that he wouldn't stop any person from going across a piece of ground he had if it didn't do him any harm. Mr. Dunn denied all knowledge of any such conversations with Crane. Other witnesses also testified that the way was used in getting to the coal houses. There was considerable testimony in regard to a fence and gate claimed to have been put across the end of this driveway, about 1885, and to have remained there a few years, but no one seemed to know who put it there, and a great many witnesses were positive that such gate never was there. It seems from the testimony that the north end of appellee's lot was never used or occupied by the owner, and was not fenced, except for the short time spoken of, and that not only appellant and her grantors, but the general public also, used the alleged way whenever they had occasion to use it. We do not find that any claim of right to use it was ever asserted by any of the witnesses. They used it because it was convenient and no one objected to its use.

To create the presumption of a grant of the right of way, the circumstances attending its use must be such as

to make it appear that it was established for the benefit of the claimant, or that it was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it without regard to the wishes of the owners of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege or license, revocable at the pleasure of the owners of the soil. (*Dexter* v. *Tree*, 117 Ill. 532.) While the acquiescence of the owner may be shown by his acts, he is allowed to testify to what his intention actually was, to be considered in connection with all the other facts and circumstances in the case. (*City of Chicago* v. *Chicago, Rock Island and Pacific Railway Co.* 152 Ill. 561.) In the case at bar, the alleged way was merely a convenience for the owner of the lot north of it. It was not a necessity, for he could drive over his own lot to reach that portion lying east of appellee's lot. It is a matter of common observation that the public makes use of any open, unenclosed space which affords a more convenient way of reaching any given place than the regular way would, and it would be contrary to established legal principles, and to natural justice as well, to allow the public, under such circumstances and by the mere acquiescence of the owner, to acquire the permanent right of way. (*Kyle* v. *Town of Logan*, 87 Ill. 64; *Town of Brushy Mound* v. *McClintock*, 150 id. 129.) Mere permissive use is never sufficient. And the same is true in acquiring a private way by prescription. There is nothing in the testimony to show that appellant or any of her grantors, or any one else, ever claimed an adverse right to the use of this supposed way. All the testimony is consistent with the permissive use of the same because the owner did not need it for his own use,—was disposed to be accommodating to his neighbors. Nor was the use continuous and uninterrupted, if we give credit to the testimony of the witnesses concerning the fence and gate. There

was conflicting evidence on some of the vital points to the controversy.

Counsel have favored us with able and exhaustive arguments, but we cannot agree to appellant's view of the case. The chancellor heard the evidence in open court, and we are not disposed on this record to disturb his decree dismissing the bill.

Decree affirmed.

FERDINAND ENGELTHALER *et al.*

v.

JOSEPH ENGELTHALER *et al.*

Opinion filed April 16, 1902.

1. WILLS—*intention to be sought for is the one expressed in the will.* The intention to be sought for in the construction of a will is not that which existed in the mind of the testator, but that which is expressed by the language of the will.

2. SAME—*parol evidence not admissible to remove a patent ambiguity.* Parol evidence cannot be admitted to explain or clear up an ambiguity appearing upon the face of the will itself.

3. SAME—*equity has no power to reform a will.* A court of equity has no power to reform a will by inserting the name of the complainant, as devisee of the fee, in a clause of the will devising the testator's property to his wife for life, but which makes no disposition of the fee to any person, although it attempts to devise the same, subject to certain charges, but names no devisee.

4. SAME—*testamentary beneficiary has no equity against the heir.* A testamentary beneficiary has no equity against the heir, and this is one reason why a court of equity will not undertake to rectify a mistake in a will, even where the mistake can be proved.

APPEAL from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

This is a bill, filed on May 10, 1901, in the circuit court of Cook county by the appellants, Ferdinand Engelthaler and his wife, for the purpose of construing the will of one Joseph Engelthaler, deceased, father of Fer-

dinand Engelthaler, against the appellees, who were the heirs-at-law of the deceased testator, and others. The will was dated June 1, 1896. Joseph Engelthaler died on September 30, 1900. His will was admitted to probate in the probate court of Cook county on November 14, 1900. By the will the appellant, Ferdinand Engelthaler, was appointed executor. The bill was demurred to, and the demurrer was sustained. Subsequently, on August 1, 1900, an amendment to the bill was filed by leave of court, and the bill as amended or the amendment thereto was also demurred to. The latter demurrer was also sustained, and the circuit court entered a decree, dismissing the bill at the costs of the complainants below, and ordering execution. The present appeal is prosecuted from such decree of dismissal.

The second clause of the will reads as follows: "After the payment of my funeral expenses and debts I give, devise and bequeath unto my beloved wife, Anna Engelthaler, all my property of every kind and nature during her natural life, should she survive me. After the death of my wife I give, devise and bequeath my homestead known as lot 23, * * * known as No. 129 West Eighteenth street" (in Chicago) "subject to the payment to my daughter, Petrolina Soukup, $300.00; to the widow of my son, Joseph Engelthaler, deceased, $400.00; to Barbara Meisinger, my daughter, $300.00; to John Engelthaler, my son, $300.00; my other children having received their share during my lifetime." It is alleged in the bill that the wife, Anna Engelthaler, died before the testator died, and also that the daughter, Barbara Meisinger, and the son, John Engelthaler, died before the death of testator.

The will fails to dispose of the fee of the homestead, devised by the testator to his wife, Anna Engelthaler, during her natural life should she survive him, and the bill alleges that, when the will was drawn, the testator directed the scrivener so to word it, that the fee of the homestead should vest in the appellant, Ferdinand

Engelthaler, a son of testator, after the death of testator's wife, should she survive him. The bill seeks to correct and reform the second clause of the will by adding thereto and inserting therein, after the words "West Eighteenth street," the words, "to my son, Ferdinand Engelthaler." As thus changed, the second clause of the will would read as follows: "After the payment of my funeral expenses and debts I give, devise and bequeath unto my beloved wife, Anna Engelthaler, all my property of every kind and nature during her natural life, should she survive me. After the death of my wife I give, devise and bequeath my homestead known as lot 23, * * * known as No. 129 West Eighteenth street, *to my son, Ferdinand Engelthaler*, subject to the payment to my daughter, Petrolina Soukup, $300.00; to the widow of my son, Joseph Engelthaler, deceased, $400.00; to Barbara Meisinger, my daughter, $300.00; to John Engelthaler, my son, $300.00; my other children having received their share during my lifetime."

The bill alleges, in support of its prayer, that the will was written by the scrivener in the English language, but that the testator did not understand the English language; and that, when the will was read to him, both the testator and the scrivener supposed that it contained the provision devising the fee of the homestead to Ferdinand Engelthaler. The bill also alleges, that the testator made statements to other persons after the execution of the will, and before his death, to the effect that he had provided for his son, Ferdinand Engelthaler, in his will by devising certain real estate to him to vest in him after the death of the testator's wife. The amendment to the bill averred that, after the will was executed, the testator made a memorandum in writing in a book, usually kept by him of his affairs and transactions, to the effect that he had devised by a will to his son, Ferdinand Engelthaler, after the death of his wife, the lot described in the bill.

FANNING & HERDLICKA, for appellants.

L. B. DYER, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The bill in this case, though nominally a bill to construe the will of the deceased testator, is, really and in effect, a bill to correct and reform the will. It is sought by the bill to correct and reform the will by inserting therein the name of Ferdinand Engelthaler, a son of the testator, as a devisee, when the will itself did not name him as such devisee. The will gave to the wife of the testator all his property of every kind and nature during her natural life, should she survive him. She did not survive him, and the general rule is that, if a legatee dies before the testator, the legacy lapses, because the gift cannot take effect until the death of the testator, and, if the legatee is then dead, he cannot be benefited thereby. (*Glover* v. *Condell*, 163 Ill. 566). The same is true as to the daughter, Barbara Meisinger, and the son, John Engelthaler, both of whom are alleged to have died before the death of the testator.

The will in fact makes no devise of the homestead lot, although it may have been the intention of the testator to devise it. If he intended to devise it to his son, Ferdinand Engelthaler, he did not say so in his will. The will cannot be corrected or reformed by a court of chancery by inserting in it the name of Ferdinand Engelthaler, as a devisee. Courts of chancery have no power to add to or reform a will on the ground of mistake. (*Decker* v. *Decker*, 121 Ill. 341; *Kurtz* v. *Hibner*, 55 id. 514; *Williams* v. *Williams*, 189 id. 500). The intention, which is to be sought for in the construction of a will, is not that which existed in the mind of the testator, but that which is expressed by the language of the will. (*Williams* v. *Williams, supra*). No intention to devise the fee of the

homestead lot, after the expiration of the life estate, is expressed by the language of the will in this case. Surrounding circumstances cannot be resorted to for the purpose of importing into a will any intention not therein expressed. (*Williams* v. *Williams*, *supra*).

Here, it is sought to prove by parol testimony *dehors* the will itself, that the testator intended to make a devise to his son, Ferdinand Engelthaler. Parol testimony cannot be admitted to explain or clear up a patent ambiguity, that is to say, an ambiguity, which appears upon the face of the will itself. Parol evidence has been admitted for the purpose of explaining or clearing up a latent ambiguity, but, in the case of a latent ambiguity, the will seems to be certain and without ambiguity for anything that appears upon its face, but there is some collateral matter outside of the will, which gives rise to the ambiguity. (1 Jarman on Wills,—3d Eng. ed.—chap. 13, p. 399; *Decker* v. *Decker*, *supra*; *Kurtz* v. *Hibner*, *supra*). In the case at bar, the ambiguity is a patent one, as it appears upon the face of the will of Joseph Engelthaler. Therefore, parol testimony could not be introduced to explain it. "Wills are required by statute to be in writing and courts are without the power of substituting for the written words of the testator other and different words not used by him. Then, to permit the substituting of words not used, in place of words used, would not only render this provision of law inoperative, but it would overthrow the Statute of Frauds, and again open the door to all the evils that that law was intended to prevent. Every consideration impels us to deny the power of courts to add to or reform a will on the ground of mistake." (*Decker* v. *Decker*, *supra*). "The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible to alter, detract from, or add to, the terms of a will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language, and insert other language in lieu there-

of, would violate the foregoing well established rule." (*Kurtz* v. *Hibner*, *supra*; *Williams* v. *Williams*, *supra*).

"In no instance has a total blank for the name been filled up by parol evidence. In such cases, indeed, there is no certain intent on the face of the will to give to any person." (1 Jarman on Wills,—3d Eng. ed.—chap. 13, p. 413). Evidence is inadmissible for the purpose of filling up a total blank in a will. (*Hunt* v. *Hort*, 3 Brown's Ch. 312; Wigram on Wills, p. 179).

A testamentary beneficiary has no equity against the heir, and this is one reason why a court of chancery will not undertake to rectify a mistake in a will. Equity rejects evidence for the purpose of explaining such a mistake, because there is no equity to be enforced, even where the mistake can be proved. Evidence *dehors* the will is inadmissible to prove an omission, not only for the reasons already stated, but because beneficiaries under wills are volunteers, and equity never aids a volunteer except in cases of fraud, which implies a consideration moving from the testator. (Wigram on Wills, p. 266).

Here, the bill seeks to insert five words, to-wit, "to my son, Ferdinand Engelthaler," in the will, and offers parol testimony to show the omission of those words. To do this would be to add to and reform the will, and against such attempts to add to and reform wills courts and legislatures have always carefully guarded. The provision of the law, which throws around the execution of wills, the safeguards of signature, and attestation, and acknowledgment in the presence of witnesses, would be rendered of no effect, if such insertions could be made in wills, and such omissions could be supplied and corrected by parol testimony. The appellant here comes into court to ask a reformation of the will in his own interest, and by the insertion of his own name, as devisee. We are of the opinion that the court below properly sustained the demurrer, and properly dismissed the bill.

Accordingly, the decree of the circuit court is affirmed.

Decree affirmed.

J. T. OLMSTEAD

v.

THE VANCE & JONES COMPANY *et al.*

Opinion filed April 16, 1902.

1. CORPORATIONS—*agreement by corporation to buy its own stock can not be enforced to injury of creditors.* An agreement by a corporation to buy its own stock is equivalent to a contract to diminish its capital, and cannot be enforced to the injury of creditors.

2. SAME—*capital stock of corporation is a trust fund for payment of its debts.* Stockholders in a corporation are charged with notice that the capital stock is a trust fund for the payment of the debts of the corporation, and hold the stock subject to all equities which attach to it, irrespective of whether there were fair dealings or fraud between the parties.

3. SAME—*as against creditors, private arrangements between corporation and subscribers to stock are ineffectual.* As against the claims of creditors of a corporation, it is immaterial what private arrangements subscribers to stock may have made with the corporation, and any device by which members of the corporation seek to avoid the liability imposed upon them by law is void as to creditors of the corporation, whether binding or not as between the parties.

Vance & Jones Co. v. *Bentley*, 92 Ill. App. 287, affirmed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

The Smith & Jones Company, a corporation of Illinois, was formed in 1893 for the purpose of manufacturing boots and shoes, with a capital stock of $125,000, $60,000 of which was subscribed by J. C. Smith, $2500 by David Tilt and $62,500 by Arthur G. Jones. On the 16th day of January, 1894, there was submitted to Bentley & Olmstead, who were wholesale boot and shoe dealers in Des Moines, Iowa, a proposition, substantially as follows: "Gentlemen—Having secured a factory in the city of Chicago and organized a limited corporation, to be known as the Smith & Jones Company, for the purpose of manufacturing boots and shoes for the wholesale trade exclu-

sively, we make you the following proposition, to-wit: That whereas the company is organized under the laws of the State of Illinois, with a paid-up capital of one hundred and twenty-five thousand ($125,000) dollars, one hundred thousand ($100,000) dollars of which is common stock and twenty-five thousand ($25,000) dollars of it preferred stock, and as the common stock has all been subscribed for, we offer you the privilege of subscribing for fifty shares of the preferred stock at par, $100, guaranteeing eight per cent dividend per annum on the same, and agree to buy back any portion of this stock at the end of two years at one hundred and ten ($110) dollars per share. * * * Thirty per cent of this (subscription price) to be paid at once, thirty per cent February 15, and the balance during March or by April 1,"—which was signed, "Arthur G. Jones, for Smith & Jones Co." This paper was written and signed in the office of Bentley & Olmstead in DesMoines, and they wrote their acceptance at the bottom of it, and afterwards sent their checks in the installments fixed by that instrument, amounting in all to $5000, which checks the company received in Illinois and accepted. Afterwards, on April 6, 1894, a certificate of stock was issued signed by the president and secretary of the company, running to Bentley & Olmstead, for fifty shares, on which was written, in ink, the word "preferred." Up to the time the fifty shares were issued to Bentley & Olmstead by the company such shares had not been paid for by any one, but the shares were deducted from those subscribed for by Smith and Jones, and the payment made by Bentley & Olmstead was credited as a payment of a portion of the subscription made by Jones and Smith. On December 22, 1893, a like proposition was made to the Vance Shoe Company, of Wheeling, West Virginia, which was accepted by them, and under its contract the Vance Shoe Company paid $5000, and received certificates for fifty shares of $100 each, marked "preferred." There was no provision in the by-

laws or charter of said company for issuing preferred stock, and it appears that nothing was done to prefer this stock otherwise than by so designating it and guaranteeing its dividends, and making the agreement to buy it back at the end of two years.

On December 8, 1894, $200 was paid as a dividend upon the Bentley & Olmstead stock, and on April 16, 1895, a like amount. No more dividends were voluntarily paid, but on June 11, 1896, Bentley & Olmstead, having purchased boots and shoes from the Smith & Jones Company, retained $400 of the price, claiming it as dividends upon their stock and endorsed it upon their certificate. The Vance Shoe Company objected to having the Smith & Jones Company, whose name had been changed to the Vance & Jones Company, allow the $400 as dividends, and that item was charged to Jones' personal account. Neither the Vance Shoe Company nor its stockholders or officers ever consented to the allowance of the $400.

On December 12, 1895, Bentley & Olmstead, by letter of that date, notified the Smith & Jones Company that they had decided to accept the company's offer of $110 per share for their stock. No other or further demand was ever made by them for the surrender or cancellation of their stock. On December 13, 1895, Mr. Jones personally replied to their letter of the 12th, in which he said, in substance: "In regard to the stock, I don't want you to dispose of it at this time as I wish to have you with me, provided the arrangement has been satisfactory to you,—and I hope it has,—and I will continue the agreement, so that you won't lose any chance of getting $110 per share, or more, at any time, but will see you some time between now and the 16th of January and will talk the matter over more in regard to your order for January goods." Some negotiations followed this correspondence, looking towards the purchase by said Jones from Bentley & Olmstead of their stock, but the negotiations failed, and the evidence does not show that any direct effort

ever was made to induce the company itself to buy back said stock. Some time after January 16, 1896,—the date the company had agreed to re-purchase said stock,—it became embarrassed, and compromised with all its other creditors for thirty-three cents on the dollar.

On June 1, 1896, the Vance Shoe Company purchased of Smith five hundred and seventy-five shares of his stock in said company and of Jones two hundred and eight shares of his stock in said company, and new capital was put into said company by the Vance Shoe Company. In the contract between the Vance Shoe Company and Jones, in the purchase of his shares, Jones agreed personally to exempt and protect the Smith & Jones Company from any action that Bentley & Olmstead might take to recover the amount paid by them for the stock they held in said company. Subsequently the Vance Shoe Company discovered that under the laws of Illinois it had no power to hold stock in another corporation, and divided its stock among its members, as follows: J. N. Vance five hundred shares, H. E. Vance two hundred and fifty shares and J. C. Riheldaffer eighty-three shares, and these gentlemen became officers of the Smith & Jones Company and changed its name to the Vance & Jones Company. In the meantime, Bentley & Olmstead had purchased merchandise from the Smith & Jones Company, and on February 1, 1898, were indebted thereon in the sum of $3001.80. A disagreement arising in the Vance & Jones Company relative to the management of the business, a bill was filed on February 1, 1898, asking that the business be wound up and liquidated, and that the same be done under a receiver to be appointed by the court, and under the order, direction and protection of the court. On the same day a receiver was appointed by the court and entered into the possession of the property. Afterwards the receiver was directed to advertise for claims against the company, and did so, and reported to the court a list of the claims which had been filed with

him, which aggregated $78,942.61. The list of claims filed included, among others, the claims of J. N. Vance for $4000, the Vance Shoe Company for $214.70, and also the claim of Bentley & Olmstead for $2498.20, which they claimed due them under the contract with the Smith & Jones Company to re-purchase their stock in that company at $5500, less the amount of $3001.80 due from Bentley & Olmstead to the Vance & Jones Company for merchandise.

On May 12, 1898, an order was entered, on the application of the receiver, on notice to all parties, that a claim should be allowed, as a just and lawful claim against the estate, in favor of each of the claimants named therein, for the amount set opposite their respective names, except as to such claim or claims to which objections should be filed within ten days from the entry of this order. Within the time allowed an objection was filed to said claim of Bentley & Olmstead by the Vance Shoe Company, J. N. Vance, H. E. Vance and J. C. Riheldaffer. It appears that said company is, and was at the time such bill was filed and receiver appointed, insolvent and unable to pay its creditors more than sixty-five cents on the dollar. On July 13, 1898, the claim of Bentley & Olmstead was referred to a master in chancery to take proofs and report. The master reported, in his opinion, that Bentley & Olmstead, having held themselves out to the world as stockholders, are estopped, as to creditors, in taking any other position, and disallowed their claim. Bentley & Olmstead filed exceptions to the master's report, which the court below sustained and allowed their claim for the sum of $2937.45. Upon appeal to the Appellate Court for the First District the decree of the circuit court allowing the claim of Bentley & Olmstead was reversed and the cause remanded, with directions to disallow said claim of Bentley & Olmstead, from which action of the Appellate Court plaintiff in error prosecutes this writ of error.

I. M. EARLE, and SAMSON & WILCOX, for plaintiff in error.

WILSON, MOORE & MCILVAINE, for defendants in error.

Mr. JUSTICE RICKS delivered the opinion of the court:

It is contended by defendants in error, the objectors below, that an agreement by a corporation to buy its own stock is equivalent to a contract to diminish its capital, and cannot be enforced to the injury of creditors. Plaintiff in error contends, that at the date of the contract between the Smith & Jones Company and Bentley & Olmstead none of the objectors were creditors; that the contract, as soon as the stock was delivered to Bentley & Olmstead, became an executed contract, and therefore no present creditors of the corporation are or can be injured, and that the corporation could lawfully make such an agreement to re-purchase its own stock, provided that at the date of such agreement the rights and interests of then existing creditors would not be affected.

It has been repeatedly held that the capital stock of a corporation is a trust fund for the payment of its corporate debts, and that the shareholders of a corporation are charged with notice of the trust character which attaches to it; that they are, to all intents and purposes, privies to the trust, and hold the stock subject to all equities which attach to it; and this is so, irrespective as to whether there were fair dealings or actual or constructive fraud between the parties. (*Clapp* v. *Peterson*, 104 Ill. 26; *Commercial Nat. Bank* v. *Burch*, 141 id. 519.) The evidence shows that neither J. N. Vance nor the Vance Shoe Company had knowledge of the conditional subscription of Bentley & Olmstead at the time the subscription was made, and that as soon as they did learn of it they objected to the carrying out of the provisions of that agreement in respect to paying the guaranteed dividends and for the re-purchase of the stock. As a matter of fact, this agreement to re-purchase has never been

carried out, and Bentley & Olmstead are now attempting to enforce this secret and conditional agreement, which it is plainly to be seen will be to the injury of the existing creditors of the corporation. This court has repeatedly held that, as against the claims of creditors, it is immaterial what private arrangements subscribers may make with the corporation, and that any device by which members of the corporation seek to avoid the liability imposed upon them by law is void as to creditors, whether binding or not as between themselves and the corporation. (*Clapp* v. *Peterson*, 104 Ill. 26; *Alling* v. *Wenzel*, 133 id. 264; *Coleman* v. *Howe*, 154 id. 458.) If such an arrangement as that made between the Smith & Jones Company and Bentley & Olmstead could be enforced, a corporation might then, at the time of its organization, make such a contract with each of its stockholders as to totally destroy the capital stock of the concern and deprive the creditors of all security from this trust fund. The capital stock is a trust fund furnished for the benefit of the creditors of the corporation, and equity will not permit it to be destroyed or impaired to their injury for the benefit of stockholders. The creditors of this corporation had a right to rely upon the application of the capital stock toward the payment of their claims, and to permit this plaintiff in error to cancel his stock upon this inequitable agreement, and to receive a premium of ten per cent in addition, would be in violent disregard of a long line of decisions of this court.

It is contended by plaintiff in error that if this claim should fail it should fail only as to those objectors who have a right to object and who do object, and that the decree should be limited to the protection of such creditors' rights. This contention is manifestly unsound. Upon objection by any of the creditors it became necessary for plaintiff in error to establish his claim. The whole foundation of this claim rests upon the agreement with the corporation to re-purchase Bentley & Olmstead's

stock. It then became necessary for the court to determine, as between plaintiff in error and the creditors, if this agreement to re-purchase could be enforced. That this agreement is void as to the creditors has been shown, and Bentley & Olmstead's entire claim resting upon this agreement must fall with it.

It is also contended by the plaintiff in error that the record in this case fails to show the objectors were creditors, and that therefore the court below properly overruled their objections. The record shows that the Vance Shoe Company and H. E. Vance duly filed their claims with the receiver. The order of the circuit court was that all claims so filed should be legal and valid claims unless objections were filed thereto within ten days, and as no objection appears to have been filed to the claims of the Vance Shoe Company and J. N. Vance, then, under the order of the court, they must be held valid and binding claims upon the company. But the record also shows that the total claims filed amounted to $78,943.81, and, calculating from the known rate and dividends paid, the total claims allowed were $73,208.16, and therefore the amount of claims objected to amounted to $5735.65. Bentley & Olmstead's claim, which was objected to and included in that amount, was for $2498.20, which leaves a balance of objected claims amounting to $3237.45. As the claim of J. N. Vance was for $4000, he must therefore be a creditor for at least $762.55. This being so, it is immaterial whether or not the other objectors were creditors.

Under the view we have taken of this case it is not necessary to discuss the numerous other points presented by plaintiff in error in his brief.

The action of the Appellate Court in reversing the cause and remanding it, with instructions to disallow said claim without prejudice to the claim of the receiver against plaintiff in error, was proper. The judgment of the Appellate Court should therefore be affirmed.

Judgment affirmed.

J. H. ALSDURF, Trustee, *v.* MARTHA WILLIAMS *et al.*
and
DAVID EVANS *v.* SAME.

Opinion filed April 16, 1902.

1. APPEALS AND ERRORS—*when freehold is involved in attachment suit.* If the property attached in aid of an action of debt is real estate, and a third person intervenes and denies the title of the defendant and claims the land adversely, the title to the land is directly put in issue and a freehold is involved in the decision.

2. HUSBAND AND WIFE—*if property belongs to wife the increase of the investment is hers.* While a wife cannot hold property of her husband to hinder his creditors, yet if the property belongs to the wife it cannot be taken for the debts of the husband, and all the increase and legitimate outgrowth of the investment are as absolutely hers as the original capital.

3. SAME—*products of wife's farm not liable for husband's debts because he works on farm.* If husband and wife live together on the wife's farm and he contributes personal labor only, such as is consistent with the common interest and the proper enjoyment of the property, the products will not belong to him nor be liable for his debts.

4. SAME—*fact that husband works on wife's farm does not enable his creditors to seize it.* If the wife purchases property with money obtained from another source than her husband she will be protected in its possession and ownership, and the fact the husband lives in the family and does work on the place does not enable his creditors to seize the farm for his debts.

APPEAL from the Circuit Court of LaSalle county; the Hon. GEORGE W. BROWN, Judge, presiding.

CORNELIUS REARDON, for appellant J. H. Alsdurf.

O. S. HAGEN, for David Evans.

DUNCAN MCDOUGALL, (FOWLER BROS., and MCDOUGALL & CHAPMAN, of counsel,) for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On January 24, 1901, David Evans commenced an action of debt in the circuit court of LaSalle county against Andrew Williams on a judgment for $294 rendered in 1882,

and he afterward sued out a writ of attachment in aid of his action. The writ was levied on a farm of 86$\frac{85}{100}$ acres in that county and stock and property on the farm. Shortly afterwards the defendant, Andrew Williams, was adjudged a bankrupt on his own petition in the district court of the United States. On March 16, 1901, Martha Williams, wife of the defendant, filed her interpleader under the statute, claiming ownership of the property attached, both real and personal. J. H. Alsdurf, trustee in bankruptcy of the estate of Andrew Williams, also filed his interpleader, denying both the right of the plaintiff and the title of Martha Williams, and asserting title in himself, as trustee in bankruptcy, to the real and personal property attached. Issues were made up and a jury was waived and the issues submitted to the court. Upon a trial the court found the issues, both upon the merits and the attachment, against the plaintiff. The court further found that Martha Williams, the intervener, was the owner of the real and personal property attached and ordered it surrendered to her. The intervening petition of the trustee in bankruptcy was dismissed and the attachment was dissolved and the suit dismissed at the cost of the plaintiff. The trustee in bankruptcy appealed from the judgment dismissing his petition, and he and the plaintiff have assigned errors on the record.

The suit involved the title to real estate and the appeal was taken directly to this court. A plaintiff in attachment seeks only to establish a lien upon the property of the defendant for the amount of his debt and no freehold is involved in the original attachment, but where land is attached as the property of the defendant and a third person intervenes and denies the title of such defendant and claims the land adversely, the title is directly put in issue by the pleadings, and the decision of the case necessarily involves the decision of such issue. A freehold is then involved. *Ducker* v. *Wear & Boogher Dry Goods Co.* 145 Ill. 653.

The intervener, Martha Williams, held the legal title to the property attached and derived it from a source other than her husband, the defendant. No part of the consideration came from him, but it is claimed that some part of it indirectly represented an interest which he had in his father's estate, and that his labor and services had been expended on the property. On these grounds it was insisted that the transaction by which she acquired title was fraudulent, and that as to creditors the property was the property of her husband, the defendant. No ruling of the court is complained of and no error of law is alleged or argued, but the claim made is that the finding and judgment of the court were contrary to the evidence.

The facts proved are, in substance, as follows: Knudt Williams died intestate in May, 1888, and the defendant, Andrew Williams, was one of his children and heirs. He left considerable farm lands, including the farm in question, but he was involved in debt and all his real estate was sold by his administrator to pay debts. Andrew Williams had no property when he was married to Martha Williams in August, 1888, except $75, which he expended on that occasion. After paying the expenses incident to the marriage neither husband nor wife had any property whatever, and Andrew Williams owed various debts, the judgment on which this suit was founded having been rendered against him before that time. The following March he leased of the administrator of his father's estate one hundred and eighty-six acres, including this farm, and he commenced farming with an equipment purchased on credit. In October, 1890, the farm was sold, with the other real estate, to pay debts of the estate. Andrew Williams was then indebted to the administrator in the sum of $746.75, secured by chattel mortgage, and had another debt of $85 secured by chattel mortgage. At the administrator's sale his brother, Joseph Williams, bought the farm. On December 10, 1890, Joseph Williams executed a contract for the sale of the farm to the wife,

Martha Williams, for $3039, payable in three years, with six per cent interest. On that day the widow, Udna Williams, received $2494.81 for her dower, and she then made presents of $500 each to her daughter, Christina, her son Joseph, and her daughter-in-law, Martha Williams, the $500 given to Martha Williams being paid by her on the land. Joseph Williams died before the deed was made, and the title was conveyed to her through a proceeding in court. It is not clear from the evidence just when payments were made, but the entire consideration for the land was paid in the end, in addition to the $500, by Martha Williams mortgaging the land to E. A. and H. A. Lormor for $2000 borrowed money, and a second mortgage to the mother-in-law, Udna Williams, for $791.95 borrowed of her. The mortgage for $2000 was not paid, but remained an encumbrance on the land at the time of the trial. The second mortgage was paid by Martha Williams to the estate of Udna Williams out of a legacy. Udna Williams died December 17, 1897, and by her will gave all her property to her daughter, Christina, her son Joseph and her daughter-in-law, Martha Williams. The share of Martha Williams was $1005, and the interest on the mortgage amounted to $142.55, making the principal and interest $934.50, which was paid out of the legacy, and the balance was paid to Martha Williams in cash. Martha Williams had possession of the farm from the time she bought it, and it was carried on and the business done in her name. The personal property which Andrew Williams had was sold to satisfy the mortgages on it. Andrew Williams and Martha Williams lived together on the farm and raised a family. She did the work in the house and he worked on the place, but his habits were not good for a number of years and he was addicted to the use of intoxicating liquors. The work was done largely by hired men employed and paid by Martha Williams. The farm was tiled and a crib and pole-barn were built, partly with new material and partly with old. At some time Andrew

Williams assigned to his mother his distributive share of his father's estate, amounting to $575.75. The record does not show when this was done, but the mother receipted for it to the administrator October 1, 1892. This is the foundation of the claim that his interest went into the farm. It is argued that this share was assigned to the mother so that she could, and did, give the $500 to Martha Williams; but that does not seem probable, inasmuch as she gave $500 at the same time to each of her other children. There is no necessary connection between the assignment and the payment on the land or the gift to Martha Williams, and it is not shown that they were concurrent. The share of Andrew Williams in his father's estate was paid to his mother, and for what reason does not appear. It was not traced into this land in any way. Joseph Williams was unmarried, and at his death Andrew became an heir, and assigned his interest in that estate to the Lormors to pay a note he had borrowed of them, which had no connection with this land.

A husband cannot rightfully carry on his business in his wife's name under an assumed agency. He can not use his wife's name as a mere device to cover up his property or keep from his creditors the profits of a business which is, in fact, his. A wife cannot hold the property of her husband to delay, hinder or defraud his creditors. (*Robinson* v. *Brems*, 90 Ill. 351; *Lachman* v. *Martin*, 139 id. 450.) But if the property belongs to the wife it cannot be taken for the debts of the husband, and all the increase and legitimate outgrowth of the investment are as absolutely hers as the original capital. If a wife owns a farm she is not required to exclude her husband from it and employ strangers exclusively, at the risk of losing her property. Where a husband and wife live together on a farm and he contributes personal labor only, such as is consistent with the common interest and the proper enjoyment of the property, the products will not belong to him or be liable for his debts. (*Primmer* v.

Clabaugh, 78 Ill. 94; *Bongard* v. *Core*, 82 id. 19; *Bennett* v. *Stout*, 98 id. 47.) Each case must be determined from its own facts and circumstances. If it appears that the wife has purchased property with money obtained from a source other than her husband, she will be protected in its possession and ownership. The fact that he lives in the family and does some work on the place will not enable creditors to seize it. By the statute, neither husband nor wife is entitled to recover any compensation for any labor performed or services rendered for the other, whether in the management of property or otherwise. (Hurd's Stat. 1899, chap. 68, sec. 8, p. 959.) If, however, a conveyance appears to be fraudulent and the husband is the real owner, or if an investment is for his benefit to enable him to carry on his business and to realize the profits of his skill and industry, it will be liable for his debts.

In this case, $2000 of the purchase money was still unpaid at the time of the trial. The balance of the purchase money was paid by the gift from the mother-in-law and out of a legacy from her. At the time the gift of $500 was made the mother gave two other children equal sums, and probably would have given the $500 to Andrew if she had deemed it wise or prudent or best for him or his family to do so. She had a perfect right to give it to the daughter-in-law and to bequeath her property afterwards as she saw fit, to secure a home to her daughter-in-law and her growing family. She had a lawful right to determine to assist the wife, and doing so did not render the farm subject to the debts of Andrew. The improvements on the farm have been made and the stock has accumulated from the products of the farm. It is true that Andrew Williams has worked there, but the evidence shows that his habits were bad and that he accumulated personal debts during the time. There were two whisky bills which were scheduled among his liabilities as a bankrupt. He had whatever money he needed

and his support and clothing, and no one can say from the evidence that his services were worth any more. The evidence does not show that the stock or property is the result of his skill, industry or ability, but that it is the legitimate outgrowth of the investment and of the farm.

We think the circuit court was right, and the judgment is affirmed. *Judgment affirmed.*

THE PEOPLE *ex rel.* C. S. Deneen, State's Attorney, *et al.*

v.

EDWARD O'BRIEN.

Opinion filed April 16, 1902.

1. ATTORNEYS AT LAW—*contempt proceedings and disbarment proceedings are distinct.* Contempt proceedings and disbarment proceedings are distinct and should not be combined.

2. SAME—*suspension of attorney for contempt is not conclusive in subsequent proceeding for disbarment.* A judgment of the circuit court finding an attorney guilty of contempt of court and suspending him from practice for six months is not conclusive upon the attorney in a subsequent proceeding in the Supreme Court for his disbarment for the same reasons for which he was adjudged in contempt.

ORIGINAL information for disbarment.

HORACE KENT TENNEY, for relators.

COLLINS & FLETCHER, for respondent.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an information filed in this court on the 15th day of October, 1901, by Charles S. Deneen, State's attorney for Cook county, in behalf of the People, upon the relation of Charles F. Loesch, Nicholas W. Hacker, Charles T. Farson, James G. Elsdon and Joseph W. Moses, the grievance committee of the Chicago Bar Association, against Edward O'Brien, an attorney and counselor at law, licensed as such under the rules of this court

and the statutes of this State, and who is engaged in practicing law in the courts of Cook county, charging that said O'Brien, while so engaged in the practice of his profession, was guilty of certain unlawful, fraudulent and unprofessional practices unworthy of a member of the bar and tending to hinder the due administration of justice in the courts of this State, which unlawful, fraudulent and unprofessional practices were committed by him in connection with and in the course of his defense as an attorney at law of a suit pending in the circuit court of Cook county wherein the International Banking and Trust Company was plaintiff and the Chicago Loan and Trust Company defendant, by inducing Hon. Richard S. Tuthill, one of the judges of said court, by means of a certain false affidavit, to approve as valid a certain fictitious and worthless appeal bond in said case, for the purpose of perfecting an appeal therein to the Appellate Court for the First District, and praying that the license of the said O'Brien be revoked and his name stricken from the roll of this court, and that he be prohibited from keeping and exercising the office of attorney and counselor at law in the State of Illinois. It was further charged in said information that on January 26, 1901, said Edward O'Brien was attached for contempt of court by Hon. Richard S. Tuthill for presenting to him said appeal bond and securing its approval by reason of a false affidavit, and that on April 5, 1901, said O'Brien was adjudged to be in contempt of court, and it was ordered that he be suspended from practicing in the circuit court of Cook county for a period of six months from that date, and that no appeal or writ of error had been sued out to reverse said order, but that the same remained in full force and effect and was conclusive upon the respondent herein.

A rule to show cause having been entered against said Edward O'Brien, on December 20, 1901, he filed in this court his sworn answer denying the charges against him

contained in the information, and averring that he was unjustly convicted in the contempt proceedings in the circuit court, and that he was guilty of no intentional wrong in preparing and presenting said affidavit and appeal bond, and that the order of suspension in the contempt proceeding in the circuit court was void for want of jurisdiction and not binding upon him in this proceeding; whereupon the relator moved the court that the rule heretofore entered against the respondent be made absolute, notwithstanding his answer, and that his name be stricken from the roll of this court, and that he be prohibited from keeping and exercising the office of attorney and counselor at law in the State of Illinois.

The case was argued orally and submitted to the court for final disposition, and the motion of the relator will be treated as a demurrer to the respondent's answer. The question therefore presented for decision is, whether or not the adjudication of the circuit court in the contempt proceeding which resulted in the suspension of the respondent is conclusive upon the respondent in this court in this proceeding. We are of the opinion it is not. The proceeding was commenced in the circuit court as a contempt proceeding and ended in the suspension of the respondent from practicing in that court for a period of six months. A contempt proceeding and a disbarment proceeding are distinct proceedings and should not be combined. If an attorney is brought into court to show cause why he should not be attached for contempt, after he has answered that charge without any further opportunity for defense he should not be punished for another and different offense. In *Ex parte Bradley*, 7 Wall. 364, Bradley was served with a rule of the Supreme Court of the District of Columbia to show cause why he should not be punished for contempt of court by reason of offensive conduct toward one of the members of that court. To this rule he made return, defending his action and denying all the allegations contained in the rule, claim-

ing that he was not guilty of contempt. Thereafter the court ordered that his name be stricken from the roll of attorneys of that court. On petition to the Supreme Court of the United States for a writ of *mandamus* to compel said court to restore the name of Bradley to the roll it was held that the order striking his name from the roll was void, for the reason that Bradley was called upon to answer the charge of contempt of court, and that when the answer to such charge came in he could not, without any further notice or opportunity of defense or explanation, be punished for another and distinct offense, to-wit, misconduct as an attorney.

As the judgment of the circuit court is not conclusive upon the respondent, and treating all facts well pleaded in the answer as true, as we must upon demurrer, the rule must be discharged.

Rule discharged.

ROSABEL F. STEVENS, Admx.

v.

ABRAM H. HADFIELD.

Opinion filed April 16, 1902.

1. RECEIVERS—*receiver in foreclosure holds rents and profits for benefit of holder of equity of redemption.* A receiver in foreclosure holds the money received as rents and profits, collected during the period for redemption, for the holder of the equity of redemption, subject only to the payment of such proper charges as may be allowed by the court, and not for the benefit of the purchaser at the sale.

2. SAME—*what not proper payments by receiver in foreclosure.* If the purchaser at a foreclosure sale takes the title subject to a prior mortgage which he covenants to pay, the receiver in foreclosure has no right to pay the interest on such prior mortgage during the period of redemption nor to pay taxes on the mortgaged premises.

3. SAME—*receiver may pay insurance.* Payments by a receiver in foreclosure, during the period of redemption, for fire and plate glass insurance, are for the benefit of the property and are properly allowed in his report.

Stevens v. *Hadfield*, 90 Ill. App. 405, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

N. M. JONES, for plaintiff in error.

B. W. ELLIS & SON, for defendant in error.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a writ of error to the Appellate Court for the First District to reverse a judgment in that court affirming a decree of the superior court of Cook county. The case was before us at a former term on appeal, and is reported in vol. 178 of our Reports, at page 532, from which will appear a statement of the preliminary facts. That appeal was brought to reverse the same order brought in review by this writ of error.

The controversy between the parties grows out of the rulings of the superior court on the report of Julius H. Stevens as receiver. On April 20, 1896, he filed his report, showing that he had collected $3421.78 and had disbursed $3735.54,—$313.76 more than he had received,—which latter amount he reported had been made good to him by Charles B. Eggleston, the purchaser at the foreclosure sale. In that report he claimed no credit for commissions to himself or for attorney's fees. The defendant in error objected to his report, first, because he claimed credit for taxes paid on the mortgaged premises after they had been purchased at the foreclosure sale by Eggleston, amounting to $701.54; second, because he paid interest on the first trust deed on the premises after the sale, amounting to $1750; third, because he paid $281.85 costs in the foreclosure suit; and fourth, because he paid insurance thereon to the amount of $524, $245 of which was paid January 14, 1896, two months before the purchaser received a deed. On these objections the matter

was referred to a master in chancery to take the evidence and report his conclusions to the court. Being advised that the master would revise the report by disallowing the claim for costs in the foreclosure suit, the receiver withdrew that item and asked an allowance for his own services of $344.75 and $100 for his solicitor's fees. The master thereupon reported, recommending an approval of the account thus amended, except the sum of $702.15 for taxes, $210 for a portion of the fire insurance premiums and $100 for solicitor's fees, thus giving the receiver credit for disbursements to the amount of $3189.60 and leaving in his hands a balance only of $232.18. The court, however, upon exceptions, approved the master's report in part only, disallowing the sum of $1750 paid on the former mortgage but allowing the claim for commissions and solicitor's fees, so that the account as approved by the court stood, receipts $3421.76, disbursements $1539.60, leaving a balance in his hands of $1882.16.

Plaintiff in error insists that the disallowance of the item of $702.15 paid for taxes during the period of redemption, and that of $1750 interest paid on the former mortgage, was erroneous. It is quite clear from the evidence that the receiver did not keep accurate accounts of his disbursements, and that the matter was largely entrusted to the firm of Mallette & Eggleston, in whose employ the receiver was at the time. We think the superior court was clearly right in excluding the foregoing items. Defendant in error was the holder of the equity of redemption, and he was entitled, as against the purchaser, Eggleston, to the rents and profits collected during the period for redemption which remained in the receiver's hands after paying the deficiency decree and other items allowed by the court. (*Stevens* v. *Hadfield*, *supra*.) The interest upon the senior mortgage was a matter with which the receiver had nothing to do. The purchaser, Eggleston, took the title subject to that mortgage, and had no right to call upon the receiver to pay

any part of it. The fact that defendant in error had assumed that mortgage by covenants in his deed conferred no right or duty upon the receiver to enforce the same. In other words, the receiver was an entire stranger to that covenant and had nothing whatever to do with the mortgage. For the same reasons he had no right to pay the $702.15 taxes. We said in *Davis* v. *Dale*, 150 Ill. 239: "The owner of the equity of redemption was entitled to receive the rents thereof after the sale and until the time of redemption expired;" and in *Stevens* v. *Hadfield*, *supra:* "Eggleston, the purchaser at the foreclosure sale, had no claim to these rents by virtue of his purchase." In other words, the receiver held the money received as rents and profits for the holder of the equity of redemption, subject only to the payment of such proper charges against it as might be allowed by the court, and not, in any sense, for the benefit of the purchaser at the foreclosure sale.

The defendant in error has filed cross-errors questioning the allowance of commissions to the receiver, his attorney's fees, insurance money and interest paid on the deficiency decree. While there may be some doubt as to whether the receiver ought to have been allowed to change his report claiming $344.75 commissions and $100 attorney's fees merely because other items of his account had been stricken out, still we think, under all the evidence in the case, the allowance is equitable and just. The item for commissions is but a few dollars in excess of that which one of the solicitors for the defendant in error testified was the usual allowance. The contention seems to be, not that he was entitled to no commissions whatever, but that he should have been allowed but five per cent instead of the amount charged, which is substantially ten per cent of the amount received and disbursed. There was no evidence as to the reasonableness of the charges except that referred to, and we think it authorized the allowance made by the court.

It is insisted that the $100 solicitor's fees should have been disallowed because the attorney employed was hostile to the defendant in error, and, under the rule announced in *Farwell* v. *Great Western Tel. Co.* 161 Ill. 522, incompetent to act. He was the solicitor of the complainant in the foreclosure proceeding, and seems to have represented, since then, the purchaser at that sale and the receiver in his litigation with the defendant in error herein. The fees charged and allowed do not, however, appear to have been for services rendered in any of this litigation. At least there is no evidence tending to show that the services claimed for were not rendered to the receiver in the matter of collecting and disbursing rents, etc. There was therefore no substantial error in the allowance of the fees.

The credit for plate glass and fire insurance on the property was properly allowed. These payments were for the benefit of the property and to preserve it from loss by fire. The small item of $20 interest on the deficiency decree was also, we think, under the evidence, properly allowed. As to that item the contention is that the receiver had in his hands funds out of which he could have paid the deficiency before the accruing of that or any other amount of interest. That he actually paid the interest appears from the evidence, and we do not feel called upon to make the computations and re-statement of his accounts for the purpose of determining whether he was properly diligent in the disbursement of money in his hands or not.

On the whole record we have reached the conclusion that the order of the superior court in its approval of the report is substantially correct and that the Appellate Court committed no error in affirming the same. Its judgment will accordingly be affirmed.

Judgment affirmed.

THE McLEAN COUNTY COAL COMPANY

v.

ROBERT SIMPSON.

Opinion filed April 16, 1902.

APPEALS AND ERRORS—*when Appellate Court's decision is final as to the facts.* If the defendant to a suit at law voluntarily joins in submitting the issues of fact to the jury without moving to exclude the evidence or asking for a peremptory instruction, he must be held to have conceded there was evidence tending to support the issues in behalf of the plaintiff, and in such case whether the preponderance of the evidence justified the verdict is a question of fact, upon which the judgment of the Appellate Court is final.

McLean County Coal Co. v. *Simpson*, 97 Ill. App. 21, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

EWING, WIGHT & EWING, for appellant.

WELTY & STERLING, and BARRY, MORRISSEY & FIFER, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The action below was case, brought by the appellee against the appellant company. On the trial of the issues before the court and a jury a verdict was returned and judgment was rendered against the appellant company in the sum of $5000. The Appellate Court for the Third District, to which the case was brought by appeal, affirmed the judgment of the circuit court. The appellant company has prosecuted this its further appeal to this court, and urges but one ground for reversal, viz., that the verdict of the jury is palpably against the overwhelming weight of the evidence, and that the circuit court erred, as matter of law, in denying a motion entered by

the appellant company for a new trial on the ground of such alleged insufficiency of the evidence to support the verdict.

In cases of this character litigants must be content with the decisions of the circuit and Appellate Courts as to all controverted questions of fact. As to such questions of fact the litigation must end with the final decision of the Appellate Court. (Hurd's Stat. chap. 110, sec. 89.) Whether there is evidence tending to support a verdict is a question of law, and if that question is presented to the trial court and ruled upon, the correctness of the determination of the point may be called in question by an assignment of error in this court. In the case at bar the appellant company did not, by motion to exclude the evidence or to direct a peremptory verdict in its favor, call upon the trial court to decide whether there was evidence tending to support the appellee's cause, but without objection proceeded to submit the issues of fact to the jury for determination. By thus voluntarily joining in the submission of the issues of fact to the jury for decision, the appellant company must be held to have conceded that there was evidence tending to support the issues on behalf of the appellee. (*Peirce* v. *Walters*, 164 Ill. 560; *West Chicago Street Railway Co.* v. *Fishman*, 169 id. 196.) That being true, whether the preponderance of the evidence justified and supported the verdict is a question of fact. Upon that contention the statute has granted the appellant but one appeal,—that to the Appellate Court. The statute expressly forbids that the decision of this contention of fact by the circuit and Appellate Courts shall be called in question in this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE CITY OF CHICAGO
v.
HENRY PECK.

Opinion filed April 16, 1902.

1. EVIDENCE—*when authority of agent to execute instrument for corporation need not be proved.* A corporation necessarily acts by its agents, and if the execution of an instrument for a corporation is not denied by verified plea, then the authority of the agent need not be proved.

2. SAME—*failure of city to deny execution of lease by verified plea is an admission of execution.* Failure of a city to deny the execution of a lease by verified plea is an admission that it was executed by the city, and that the mayor, acting for the city, had authority to execute it, and in such case the lease is admissible in evidence without proof of its execution or the authority of the mayor.

3. SAME—*section 33 of Practice act applies to municipal corporations.* Section 33 of the Practice act, (Rev. Stat. 1874, p. 779,) which provides that no "person" shall be permitted to deny the execution of a written instrument except by verified pleas, establishes a rule of evidence embracing in its terms all persons, natural or artificial, and includes municipal corporations.

4. SAME—*when lease is admissible against city without proof of regularity of steps taken by city authorities.* If the lease sued upon is one which the defendant city had general power to make, the lease is admissible without preliminary proof that the authorities have taken the requisite steps to authorize the lease in the particular case, since, if they have not, the city must plead and prove such facts as render the particular lease illegal, if it desires to avoid the obligation. (*Dement* v. *Rokker*, 126 Ill. 174, distinguished.)

5. SAME—*what need not be proved in every suit against city.* A plaintiff is not required, in every suit against a city, to show that the city was not indebted beyond the constitutional limit, or that the expense involved in the contract sued upon did not exceed the appropriations.

6. SAME—*when proposed method of proving ownership is improper.* In an action against a city on a lease, the defendant has a right to prove that the plaintiff has conveyed his interest, or that it has been sold on execution, or that the estate was a limited one which had expired during the term; but it is not entitled to do so by naming over certain persons to a witness, on cross-examination, and asking him if such persons did not own a part of the premises.

City of Chicago v. *Peck*, 98 Ill. App. 434, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN M. GIBBONS, Judge, presiding.

CHARLES M. WALKER, Corporation Counsel, and WILLIAM H. FITZGERALD, for appellant.

CHURAN & SABATH, and E. U. FLIEHMANN, (CHARLES A. CHURAN, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court affirmed a judgment against appellant, recovered by appellee in the circuit court of Cook county for rent according to the terms of a lease, by which appellee leased to appellant certain property which it took possession of and used for purposes of a small-pox hospital.

The first point made in the argument in behalf of appellant is, that the trial court erred in admitting the lease in evidence. The execution of the lease was averred in each of the three special counts of the declaration, and a copy of it was annexed to and filed with the declaration. The only plea was the general issue, and it was not verified. Under the provisions of section 33 of the Practice act the defendant could not be permitted to deny, on the trial, the execution of the lease. (Hurd's Stat. 1899, p. 1288.) The statute establishes a rule of evidence and embraces in its terms all persons, natural and artificial. No exception is therein made in favor of municipal corporations, and under the rule enacted for the construction of statutes, the word "person" extends to bodies politic and corporate as well as individuals, where such construction is not inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute. (Hurd's Stat. 1899, p. 1649.) The legislature have nowhere manifested an intention that municipal corpo-

rations shall not be governed by the same rules of evidence as other litigants, and the construction which includes them within the rule is not repugnant to any provision of the Practice act. The lease was alleged to have been executed by the defendant, and it purported on its face to be the instrument of the defendant. It recited that it was made "between Henry Peck, of the city of Chicago, county of Cook and State of Illinois, party of the first part, and the city of Chicago, in Cook county and State of Illinois, party of the second part." By its terms the party of the first part, Henry Peck, leased the premises therein described to the party of the second part, and the party of the second part, in consideration of such leasing, agreed to pay the rent therein stipulated, and, upon the expiration of the term, to remove all the buildings and other improvements placed thereon by it and to put the premises in the same condition as at the time it took possession. It recited that it was signed and sealed by the parties, and it bore the signatures and seals of Henry Peck and John P. Hopkins, mayor, and was approved by M. B. Madden, chairman of the finance committee. It did not purport to be a lease to the mayor nor an agreement on his part to pay the rent and restore the premises to their former condition. The only construction that can be put upon the lease is, that it is the instrument of the defendant executed in its behalf by the mayor. Where an instrument purports to be executed by an agent, the authority of the agent is a material part of the execution, and to admit the execution is to admit all the essentials to the execution. To require proof of the execution is to require proof of the authority to execute the instrument, and if the execution is denied by a verified plea, the authority of the agent constitutes an essential part of the plaintiff's proof. A corporation necessarily acts by its agents, and if the execution of the instrument is not denied by verified plea it is not necessary to prove the authority of the agent. (*Delahay* v.

Clement, 2 Scam. 575.) The failure to deny the execution of the lease by verified plea was an admission that it was executed by the city, necessarily including the fact that the mayor, acting for the city, had authority to execute it. It was not error to admit the lease in evidence without proof of its execution or of the authority of the mayor to execute it.

It is further insisted that the lease could not be admitted in evidence until the plaintiff had proved, first, a previous appropriation for the expense involved in the leasing by an ordinance duly passed by a vote taken by yeas and nays during the first quarter of the fiscal year, or if for a casualty during the year, by a two-thirds vote taken in the same manner; second, an ordinance authorizing the making of the contract; third, that the proposed contract was duly advertised; fourth, that bids were received, and that plaintiff was the lowest bidder. It is not denied that the defendant had power to rent the premises from plaintiff for a small-pox hospital. It is conceded that it had power to do all acts and make all regulations necessary or expedient for the suppression of that disease. In making the lease the plaintiff dealt with John P. Hopkins, the mayor, M. B. Madden, chairman of the finance committee, and the commissioner of public health. The defendant entered upon the possession of the premises, fenced the same, erected a small-pox hospital and buildings thereon, and occupied them for a legitimate and lawful purpose within its express powers. The making of the lease was within the general scope of the authority of the defendant, and in such a case, where there is general power to do an act, if the authorities have failed to take the requisite steps to authorize the act in the particular case, it must plead and prove the facts which render the particular contract illegal. The obligation is not *ultra vires*, as being beyond the authority conferred upon the defendant by its charter, and if it seeks to avoid the obligation on account of

its want of power it must make good its defense by plea and proof. (14 Ency. of Pl. & Pr. 243; *City of Chicago* v. *English*, 180 Ill. 476.) The defendant was required to take certain steps in the execution of the power, among which was the making of an appropriation to meet the expense. Contracts by a city are prohibited unless an appropriation has been made concerning the expense, and the officials cannot add to the expenditures anything over and above the amount provided by an appropriation. Whether the provision that all contracts for making a public improvement, where the expense exceeds $500, shall be let to the lowest responsible bidder after advertising, could be applied to this case or not, any defense of that nature must be made by special plea, and that was not done in this case.

Counsel claim that a contrary rule was laid down in *Dement* v. *Rokker*, 126 Ill. 174. That was a proceeding in *mandamus* to compel the commissioners of State contracts to certify petitioners' accounts to the Auditor of Public Accounts and to compel the Auditor to draw his warrant therefor and the Treasurer to pay the same. The defendants answered that the contract was not let to the lowest responsible bidder, but that there was an unlawful conspiracy to prevent competition in bidding, and that the contract was let in violation of the law authorizing it. The petitioners demurred to the answer, and thereby admitted the facts stated in it. The court held that if the facts alleged in the answer were true, the contract was illegal and could not be enforced, and as the demurrer admitted such facts, the judgment of the circuit court in favor of the petitioners was reversed. In *mandamus*, to entitle a petitioner to the writ, he must show a clear right to the relief sought, and even in that case the defense of illegality was raised by the answer. The commissioners of State contracts were not a corporation, but exercised a naked power purely statutory. It was not intended by anything said in that case to lay down the

rule that a contract of a corporation within the general scope of its powers is presumed to be unlawful until the contrary is proved. A city cannot become indebted beyond a certain limit and its officers cannot exceed the lawful appropriations in making contracts, but a plaintiff is not required, in every suit against a city, to show that the city was not indebted beyond the constitutional limit or that the expense involved in the contract did not exceed the appropriations.

It is also claimed that the court erroneously refused to allow defendant to show that plaintiff's title had terminated or expired. The court committed no error in that regard. The defendant, on cross-examination, asked a witness a number of questions in which different persons were named, and he was asked if such persons did not own part of the premises. If plaintiff had conveyed his interest, or if it had been sold under execution, or if his estate was a limited one and expired during the term, the defendant might prove such fact, but there was no attempt to do so. The proposed method of proving ownership was not proper.

It is further urged that the court erred in allowing plaintiff's witnesses to testify to mere conclusions. The testimony related to the time when the city of Chicago entered upon the premises, and whether it surrendered possession at the expiration of the lease, and what it did, if anything, toward surrendering possession. We do not regard the testimony as relating to mere conclusions, but to facts.

The trial was before the court without a jury, and the defendant moved the court to exclude the evidence and find for the defendant. The motion was denied, and this is assigned as error. The claim was for rent, according to the terms of the lease, after its expiration. There was evidence on the part of the plaintiff tending to prove a holding over by the defendant after the term. That testimony was contradicted, but the question whether the

finding was against the preponderance of the evidence was for the Appellate Court. The court could only exclude the evidence for the plaintiff, on the motion, if it did not fairly tend to prove the cause of action. The ruling, therefore, was not erroneous.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

MADISON MAGINN

v.

ISAAC BASSFORD *et al.*

Opinion filed April 16, 1902.

APPEALS AND ERRORS—*franchise not involved in suit to set aside or redeem from conveyance of a patent.* A suit to set aside or redeem from a conveyance of letters patent, in nowise questioning the existence or validity of the patent itself, does not involve a franchise, so as to authorize a direct appeal to the Supreme Court, even assuming that a patent is a franchise, within the meaning of the statute.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

MCCLELLAN & SPENCER, for plaintiff in error.

GEORGE E. WALDO, (ARTHUR F. EVANS, of counsel,) for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill in the superior court of Cook county to set aside, or redeem from, two conveyances of a patent right issued to plaintiff in error by the United States, which conveyances he claimed were in the nature of mortgages. Upon a hearing the court held the first conveyance to be an absolute conveyance of all rights of plaintiff in error in the patent to Bassford, and dismissed the bill for want of equity. From this decree this writ

of error was sued out and the record brought to this court on the ground that the determination of the cause involved a franchise.

Defendants in error insist that a franchise is not involved in this appeal, within the meaning of the statute, and that the writ of error should have been sued out in the Appellate Court. They make the point that a patent is not a franchise, but a mere contract between the inventor and the public, and that even if it is a franchise, the present suit merely relates to the title to the patent as affected by the conveyances, and in no way involves the validity of the letters patent; that the validity or existence of a franchise must be in issue in order that a franchise shall be involved within the meaning of the statute. Admitting, for the sake of the argument, that a patent is a franchise, still it does not necessarily follow that this case is properly before this court. We have held that an action involving the right of certain persons to be or to form a corporation, or questioning the legality of a corporation, or winding up a corporation, involves a franchise; (*People* v. *O'Hair*, 128 Ill. 20; *Hazelton Boiler Co.* v. *Hazelton Tripod Boiler Co.* 137 id. 231; *Drummond Tobacco Co.* v. *Randle*, 114 id. 412; *American Loan and Trust Co.* v. *Minnesota and Northwestern Railroad Co.* 157 id. 641; *People* v. *City of Spring Valley*, 129 id. 169; *People* v. *Cooper*, 139 id. 461; *St. Louis and Sandoval Coal and Mining Co.* v. *Edwards*, 103 id. 472;) and that a franchise is involved when the right of a railroad company to exercise its eminent domain powers under the statute is questioned. (*Chicago and Western Indiana Railroad Co.* v. *Dunbar*, 95 Ill. 571.) It will be noted that in all these cases the existence or validity of the franchise, or the right to the exercise of the franchise, was involved, but in none of them was the mere title to the franchise involved.

Nor is the case of *Rohn* v. *Harris*, 130 Ill. 525, decisive of the question, as counsel seem to think. That was a bill for a partition of a ferry franchise and the land ap-

pertaining thereto, and the Appellate Court said that it was not properly appealed to that court for two reasons: that it involved a franchise and that it also involved a freehold; but placed its refusal to take jurisdiction on the former ground. (*Rohn* v. *Harris*, 31 Ill. App. 26.) This court held that it partook so far of the nature of real estate that it could be partitioned in the same manner as real property. Nothing was said in regard to the question of a franchise being involved.

Nor will the analogy of title to a freehold be conclusive of the question. Franchises differ in their nature from freeholds. The very essence of a freehold lies in the title to the land, for, as Blackstone says, it is the means whereby the owner of lands hath the just possession of his property; (2 Blackstone's Com. 195;) and any action whereby one party does not of necessity lose the title to the land and the other party gain it by the judgment or decree in the cause, or where the title is not put in issue by the pleadings, does not involve the freehold, as we have frequently held. The land itself, which is the subject upon which the title operates, has existed from time immemorial, and in law no question can arise as to the existence of the land, but only as to the title to it. But a franchise is something incorporeal and artificial, created by the will of the sovereign authority, and its very essence lies in its existence,—in the right to exercise it. Whether this right, when its existence is conceded, belongs to A or B in no way affects the franchise as a franchise. A transfer or assignment of the right from A to B would not affect the franchise, unless it were claimed or shown that such transfer was in some way forbidden, so as to affect the very existence of the franchise itself.

State courts have no jurisdiction where a question affecting the validity or infringement of letters patent is directly concerned, but all contracts relating to the conveyance or transfer of patents are within their jurisdic-

tion. The gist of the present suit is to determine the validity and effect of the assignments made of the letters patent, which constitute the subject matter of the litigation. It involves the interpretation of certain documents relating to the letters patent, and in nowise questions the existence or validity of the patent itself. A franchise is not involved, in the contemplation of the statute.

The writ will be dismissed, with leave to plaintiff in error, if he desires it, to withdraw the record, abstracts and briefs for filing in the Appellate Court.

Writ of error dismissed.

CANUTE R. MATSON, for use, etc.

v.

WILLIAM RIPLEY *et al.*

Opinion filed April 16, 1902.

1. EVIDENCE—*when a bill of sale is improperly admitted in evidence.* In a suit on a replevin bond given in an action of replevin for certain lumber, a bill of sale for a certain lot of pine and cedar logs sold to the defendant, bearing an endorsement purporting to be a memorandum of the filing of the bill by the endorser, as town clerk, is improperly admitted in evidence where there is no proof that the lumber was cut from the logs described in the bill of sale, or that the seller resided in the township where the bill purported to have been filed, or that the party making the endorsement was the town clerk, or assumed to act as such.

2. SALES—*a purchaser in possession of personal property is protected against subsequent sale.* If, as between the parties to a bill of sale, the purchaser has a valid claim on the property, the delivery of the property to him by the seller precludes the latter from conveying a valid title thereto to a creditor of his who attaches the property after its delivery to the purchaser in the bill of sale.

Matson v. *Ripley*, 98 Ill. App. 479, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

HOYNE, O'CONNOR & HOYNE, for appellant.

M. B. & F. S. LOOMIS, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

William Ripley and Bradford W. Ripley, two of the appellees, brought a suit in replevin in the circuit court of Cook county against the partners composing the firm of Kellogg, Ducey & McAuley, and William W. Oliver, for one hundred thousand feet of pine lumber on board the vessel *William H. Dunham*, lying in port in the Chicago river, and executed a replevin bond in the sum of $2400, with the appellee John C. Durgin as surety, to the appellant, Canute R. Matson, sheriff of said county. The property was taken under the writ of replevin, and the suit, on motion of plaintiffs, was dismissed at their costs and a return of the property was awarded. This suit was brought on the replevin bond by appellant for the use of Kellogg, Ducey & McAuley and William W. Oliver, and appellees pleaded that the merits were not determined in the replevin suit, and that the appellees William Ripley and Bradford W. Ripley, constituting the firm of Ripley & Son, were the absolute owners of the goods. A jury was waived and the issues submitted to the court, which found them for the appellant. The attorney's fees on behalf of the defendants in the replevin suit were proved to be $50, and the court assessed appellant's damages at $51, not including anything for the value of the lumber. Judgment was entered for the debt, $2400, and damages, $51, the debt to be discharged on payment of damages. The Appellate Court affirmed the judgment.

The facts proved were these: The defendants, Ripley & Son, were lumber dealers in Chicago. Hibbard & Co. operated a saw-mill at Masonville, Michigan. In 1889 Ripley & Son advanced $18,000 or more to Hibbard & Co. under an arrangement by which they were to receive the

output of the mill to reimburse them. Ripley & Son paid the expenses of rafting and of operating the mill, and received the lumber at the mill and shipped it to Chicago, paying freight charges, insurance and other expenses. They credited Hibbard & Co. on their advances with whatever the lumber was worth in Chicago. During that summer they had control of the schooner *William H. Dunham*, and it was engaged in their employ nearly all of the summer of 1889 bringing the lumber from the mill to Chicago. On October 8, 1889, Ripley & Son sent the schooner to Masonville for a load of the lumber. It arrived at the mill and began loading October 10 with the aid of a scow, which the captain procured at the expense of Ripley & Son and which took the lumber from the dock to the schooner. On October 11 part of the lumber was on board the schooner and part in the scow, when a replevin writ for the lumber, sued out by Richard Mason against Hibbard & Co., was served. He claimed that the logs from which the lumber was made had been cut by McArthur & McLellan from lands of the Mason estate, and his claim was for stumpage. Hibbard & Co. settled Mason's claim by paying him $500, when the lumber was released by the sheriff. On October 14, 1889, the schooner was nearly loaded and some lumber was still in the scow, when William W. Oliver sued out a writ of attachment against Hibbard & Co., and a deputy sheriff took possession under the attachment writ. All the lumber levied on was in the possession of Ripley & Son, delivered to them by Hibbard & Co. under the arrangement. Hibbard & Co. settled the attachment suit by giving Oliver a bill of sale of the lumber, the consideration stated being $900. The captain of the schooner gave Oliver a receipt for the lumber, to be delivered to Kellogg, Ducey & McAuley, at Chicago. It seems that Kellogg, Ducey & McAuley had a claim against Hibbard & Co. which was assigned to Oliver. There was evidence that Hibbard & Co. told Oliver and Mr. Kellogg, representing Kellogg, Ducey &

McAuley, that the lumber belonged to Ripley & Son, but this was denied by Oliver. The vessel returned to Chicago with the lumber and the lumber was taken by virtue of the writ of replevin.

The first complaint is, that the trial court erred in admitting in evidence, over the objection of plaintiff, two bills of sale and the endorsements thereon. These bills of sale were made in the spring of 1889 by Hibbard & Co., and purported to convey to Ripley & Son a large amount of pine and cedar logs, cedar posts and cedar ties lying in the Tacossh, Rapid and Whitefish rivers, and marked on the end with the letter "H." The endorsements purported to be memoranda of the filing of the bills of sale by P. G. Wright and Percival Cadby, respectively, as town clerk of Masonville, Michigan. The purpose of the memoranda was to show the filing of the bills of sale, which were intended as mortgages, in compliance with the laws of Michigan. There was no evidence that the parties making the endorsements were town clerks of Masonville, or that either of them held or assumed to hold the office of town clerk or acted as such, or that Hibbard & Co. lived in the township in which the bills purported to be filed. There was no evidence that the lumber in question was sawed from the logs described in the bill of sale, but the evidence was to the contrary. The bills of sale were dated March 11 and April 18, 1889, and described logs, posts and ties marked on the end with the letter "H," while the evidence was that this lumber was sawed from logs with a different mark, bought from McArthur & McLellan. The bills of sale and endorsements were not evidence of title to the lumber in Ripley & Son or of a lien thereon, and it was error to admit them in evidence.

We are satisfied that the error should not have the effect to reverse the judgment. There was no evidence tending in any manner to impeach the entire good faith of the transaction on the part of Ripley & Son or to contradict the evidence showing them to be entitled to the

lumber. They had advanced a large sum of money to Hibbard & Co. and had paid the running expenses of the mill. They sent the schooner for the lumber, as they had been doing during the summer, and it had been delivered to them. As between the parties to the agreement, Ripley & Son had a valid claim on the lumber and could have recovered it from Hibbard & Co., and assuming that, while the lumber remained in the possession of Hibbard & Co., a purchaser in good faith from them would have acquired a good title and cut off the rights of Ripley & Son, he could not acquire such a title after the delivery of the lumber. The law will not permit the owner of personal property to create an interest in another and still continue in possession as the visible owner except by an instrument duly recorded. But that rule does not affect the rights of these parties. The Michigan statute offered in evidence applies only to a conveyance intended to act as a mortgage, not followed by an actual *bona fide* possession of the things mortgaged. It is beyond question that in this case there had been such actual *bona fide* change of possession. When the writ of attachment was issued Hibbard & Co. were not in possession, had no power to convey and no title remained in them liable to attachment. Oliver gained no right by his levy and acquired no title by the bills of sale of Hibbard & Co. or the receipt of the captain of the schooner.

The court refused the third proposition submitted as the law by the plaintiff. It stated a correct rule of law as applied to the bills of sale, but if it had been held to be the law it would not authorize a finding for the plaintiff. It related only to the effect to be given to the bills of sale in determining the title to the property. The error in refusing it was not prejudicial to the plaintiff.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CHARLES H. STARKWEATHER
v.
NELLIE MAGINNIS, Exrx.

Opinion filed April 16, 1902.

1. EVIDENCE—*receipts may be explained by oral testimony.* A party to whom receipts for rent have been given, may explain, by oral testimony, why the receipts ran in the name of another person than himself.

2. TRIAL—*court may refuse peremptory instruction asked after series has been given.* The court may refuse a peremptory instruction to find for the plaintiff, asked after the issues have been submitted to the jury upon instructions given at the request of each party.

Starkweather v. *Maginnis*, 98 Ill. App. 143, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

MASON BROS., (HENRY E. MASON, of counsel,) for appellant.

J. M. H. BURGETT, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The probate court of Cook county allowed a claim filed by appellant, Charles H. Starkweather, against the estate of Patrick J. Maginnis, deceased, of which appellee is executrix. On appeal to the circuit court there was a trial and a verdict against appellant, and judgment was entered against him for costs. The Appellate Court affirmed the judgment.

Plaintiff leased certain premises in Chicago to Thomas F. Brady, and Patrick J. Maginnis guaranteed the payment of the rent and a performance of the covenants of the lease by Brady. The claim was for rent, and the defense was that plaintiff evicted Brady from the demised premises and leased the same to Patrick J. Heffron, whom

he put in possession, and that Brady was thereby excused from the payment of the rent guaranteed by Maginnis. Heffron testified to the eviction, and that he rented the premises and took possession of them and was to pay $500 a month as rent. Checks of Heffron and receipts of plaintiff were put in evidence showing such payment. The receipts ran to T. F. Brady, and it is alleged as error that the court permitted Heffron to explain how he came to take receipts in that way. Receipts may be explained orally, and there was no error in the admission of the evidence. *Carr* v. *Miner*, 42 Ill. 179; *Reading* v. *Traver*, 83 id. 372.

Counsel for appellant argued at length that the verdict was against the clear preponderance of the evidence, but that question has been finally settled by the Appellate Court. They also say that under any aspect of the case the court should have instructed the jury to find a verdict for the plaintiff. No instruction of that kind was asked before the submission of the case to the jury. The issues were submitted to the jury upon instructions given at the request of each party, and the abstract shows that after the giving of such instructions the plaintiff, by his counsel, asked the court to give a peremptory instruction to find for him, which the court refused. It was not error to refuse it at that time. (*Calumet Electric Street Railway Co.* v. *VanPelt*, 173 Ill. 70.) Moreover, it is apparent that the court would not have been justified in giving such an instruction if asked at the proper time. If the testimony of the witness, Patrick J. Heffron, was true, there was an eviction of the tenant, Brady, and no further liability for rent. The plaintiff contradicted Heffron, but the determination of the controverted questions of fact depended upon the credibility of the witnesses in connection with all the facts and circumstances proved, and the court would not have been authorized to direct a verdict.

There is no error in the record and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Christian Schierhorn *et al.*

v.

THE VILLAGE OF FRANKLIN PARK *et al.*

Opinion filed April 16, 1902.

This case is controlled by the decision in *Vance* v. *Rankin*, 194 Ill. 625.

APPEAL from the Circuit Court of Cook county; the Hon. CHARLES G. NEELY, Judge, presiding.

WILLIAM NUNN, for appellants.

GUY H. POWELL, for appellees.

Per CURIAM: This is a petition for *mandamus*, filed by the relators in the circuit court of Cook county, to compel the appellees, the president and trustees of the village of Franklin Park, to pass an ordinance disconnecting certain territory described in the petition from said village, under an act entitled "An act in relation to the disconnection of territory from cities and villages," in force May 29, 1879.

The petition to the trustees of the village was filed with the board on the 20th day of June, 1900. The petition for *mandamus* was filed in the circuit court on the 17th day of September, 1900, and during the pendency of the proceedings the General Assembly, by an act approved May 10, 1901, and in force on the same day of the approval thereof, repealed the act of May 29, 1879, and adopted a new enactment investing the governing bodies of cities and villages with discretionary power to grant or refuse petitions for the disconnection of territory. Section 4 of the new enactment declares the provisions of the act shall apply to pending applications for the disconnection of territory from cities and villages. The trial court enforced the new enactment and declined to issue the writ of *mandamus*. The appeal challenges

the validity of the new act upon constitutional grounds. The same questions were discussed in this court in the case of *Vance* v. *Rankin*, 194 Ill. 625, and decided adversely to the contention of the appellants. Upon the authority of that adjudication the judgment herein appealed from must be and is affirmed.

Judgment affirmed.

HARTFORD LIFE AND ANNUITY INSURANCE COMPANY

v.

MARION ROSSITER *et al.*

Opinion filed April 16, 1902.

1. DEFAULT—*when refusal to set aside default will be upheld.* A judgment refusing to set aside default will not be reversed, on appeal, unless it appears there has been an abuse of discretion by the trial court, the rule being that both diligence and merit must be shown, and if defendant has not used due diligence to protect his rights it is not an abuse of discretion to refuse to vacate the default.

2. PRACTICE—*counter-affidavits may be filed on a motion to set aside default.* While counter-affidavits will not ordinarily be heard upon motion for a new trial or for a continuance, yet they may be filed and considered upon a motion to set aside a default and vacate the judgment; and if the affidavits and counter-affidavits flatly contradict each other, the action of the court in giving credence to one rather than the other cannot be assigned as error.

3. SAME—*how to proceed where court overrules motion for leave to file bill of exceptions.* If, after refusal of the court to set aside a judgment by default, the defendant prays an appeal and moves for leave to file a bill of exceptions, which prayer and motion are denied, the defendant should except to the action of the court and preserve such exception by a bill of exceptions, and if the judge refuses to sign and seal a bill of exceptions incorporating such ruling when properly presented, the remedy of the defendant is by *mandamus* and not by appeal or writ of error.

Hartford Life and Ann. Ins. Co. v. *Rossiter*, 98 Ill. App. 11, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

PARKER & PAIN, for appellant.

FREDERICK A. BROWN, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action of assumpsit brought by the appellees, who were minors, by their next friend, Frederick C. Rossiter, in the circuit court of Cook county, on a certificate of membership issued by appellant on the life of Frank N. Rossiter, the father of appellees, who died on March 31, 1899. Service of summons was had in time for the April term, 1900, and the declaration was filed to the May term of said court, which gave the appellant until the 23d day of that month in which to plead. On May 31, no plea having been filed, a default was entered and judgment rendered against the appellant for the sum of $1008.33. At the same term of court a motion was made by the appellant to set aside the default and that it be let in to plead, etc., which motion was overruled and the appellant sued out a writ of error from the Appellate Court for the First District, which court affirmed the judgment of the circuit court, and an appeal has been prosecuted to this court.

In a case of this character the judgment of a trial court will not be reversed, on appeal, unless it appears there has been an abuse of discretion by that court in refusing to set aside the default and permit a defense upon the merits. The rule is, that diligence and merit must both be shown, and when it appears that the party defaulted has failed to exercise due diligence to protect his rights, it has never been held an abuse of discretion to refuse to vacate a default judgment. *Barrett* v. *Queen City Cycle Co.* 179 Ill. 68.

The showing as to diligence is embraced in the affidavit of E. H. Stearns, which states that he is the traveling agent of the appellant; that on or about April 15, 1900, he was notified to take charge of this case; that on

that day he went to the office of Frederick A. Brown, appellees' attorney, in the city of Chicago, for the purpose of ascertaining the facts of the case, as the papers were at the home office in Hartford, Connecticut; that he held a conversation with said attorney; that he left agreeing to return with the papers and other data in the case; that he was led to believe by said attorney, and did believe, that no declaration would be filed and no action taken in the case until his return; that relying upon his understanding with said attorney he notified the attorneys for appellant to do nothing in the case during his absence; that he returned to Chicago on June 2, 1900, having all the papers and other data in his possession, and went to the office of appellees' attorney, and then learned for the first time that a judgment had been entered by default against the appellant.

The affidavits of appellees' attorney and Frederick C. Rossiter, who was present at the time of the interview between said attorney and Stearns on April 15, were read upon the hearing of the motion to set aside the default, in which they both deny that there was any understanding or agreement between said attorney and Stearns that no action would be taken in the case until Stearns returned to Chicago, and state that said attorney, during the interview, gave to Stearns a statement in writing that appellant would have until May 21, 1900, in which to plead to said action, which statement Stearns was notified to produce upon the hearing of the motion, but which he failed to produce, although he appears to have had the same in his possession on June 2, 1900.

The affidavit of Stearns failed to show any sufficient excuse for the failure to plead in time. It states he was led to believe, and did believe, that no declaration would be filed until his return to Chicago, and that, relying upon his understanding with appellees' attorney, he notified appellant's attorneys to do nothing during his absence. The affidavit was but a statement of the conclusions of

the affiant, and did not state any facts from which the court could determine that there was an understanding between appellees' attorney and Stearns that no action should be taken in the case until his return to Chicago, and was not sufficient to justify the court in setting aside the default. Furthermore, the affidavit in support of the motion was flatly contradicted by the counter-affidavits filed by appellees. While counter-affidavits will not be heard upon a motion for a new trial or for a continuance, this court in *Boyle* v. *Levi*, 73 Ill. 175, *Palmer* v. *Harris*, 98 id. 507, and *Hefling* v. *VanZandt*, 162 id. 162, has recognized the right to file counter-affidavits upon a motion to set aside a default and vacate a judgment. In *Palmer* v. *Harris*, *supra*, which was a motion to set aside a default and be let in to plead, etc., the court said (p. 509): "Where the affidavits on a motion of this kind are flatly contradictory of each other, the action of the court in giving credence to the one rather than to the other cannot be assigned for error."

On the 14th day of June, 1900, and after the court had overruled the motion to set aside the default and judgment, from which order the appellant had prayed an appeal to the Appellate Court for the First District, which had been allowed, and had been given time in which to file a bill of exceptions, it again appeared in court and prayed an appeal from the judgment rendered by the court on the 31st day of May, and entered its motion for leave to file a bill of exceptions in the matter of said judgment, which prayer for an appeal was denied and motion for leave to file a bill of exceptions overruled. The appellant took no exceptions to the action of the court refusing to allow such appeal or in declining to allow a bill of exceptions to be filed. If the appellant desired to have the action of the court in declining to allow an appeal from said judgment reviewed on appeal, it should have excepted to the ruling of the court and preserved such exception by bill of exceptions. If the

judge refused to sign and seal a bill of exceptions when properly presented, incorporating therein such ruling, its remedy was by *mandamus* to compel the judge to sign and seal the same, and not by appeal or writ of error. There is, therefore, no question before this court involving the action of the court in refusing to grant said appeal, or in declining to sign and seal a bill of exceptions in the matter of said judgment.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

ALBERT H. WOLF

v.

BERNARD COLLINS, Admr.

Opinion filed April 16, 1902.

LIMITATIONS—*when amendment does not state a new cause of action.* A declaration charging that defendant's foreman negligently inserted a certain handle in a hole in a brace and gave said brace a sudden and violent twist or shake, which caused the brace to fall, carrying plaintiff's intestate with it, may be amended more than two years after the injury by adding, between the word "negligently" and the word "inserted," the words, "unfastened a rope by which said brace was fastened and which would prevent its falling, and," without being open to the objection that it states a new cause of action.

Wolf v. *Collins*, 94 Ill. App. 518, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. S. C. STOUGH, Judge, presiding.

This is an appeal from a judgment of the Appellate Court affirming a judgment of the superior court of Cook county for $2500, rendered in favor of the appellee and

against the appellant in an action on the case prosecuted to recover damages on account of the death of Lawrence Collins, deceased.

The evidence shows that the appellant was a building contractor, and as such was doing the structural iron work on a new post-office building at St. Paul, Minnesota. The building was some two hundred feet one way by one hundred and twenty-five feet the other, and was five stories high. Appellant lives in Chicago and the work was under the general supervision of one Maloney, his foreman or superintendent, who also had a working interest in the profits. Under Maloney there was a subforeman, Charles Kindt, who, it seems, had charge of the gang in question, composed of four men and the foreman. At the time of the accident this gang was endeavoring to put a brace diagonally across a panel which was nine or ten feet square, and consisted of an upright beam at each corner, upon which were placed I-beams extending from one column to the other. These I-beams were about nine feet above the next floor below and some one hundred and forty odd feet above the basement. There were three boards placed across this panel on the floor below. Deceased sat on the south I-beam and his brother on the west I-beam, and the brace in question, some ten feet in length and weighing about two hundred pounds, was raised from the floor below by means of two ropes, one on each end. The ropes extended up over the I-beams and the other ends were held and pulled by two men below. When the brace was thus raised to its position it rested upon the flange on the inside of the I-beam, and deceased's brother inserted a bolt through his end of the brace and the I-beam upon which he was sitting, but deceased for some reason was unable to get the bolt through his end. The foreman saw the difficulty and climbed up a ladder to where deceased was sitting. He then, according to appellee's contention, untied the rope and let it drop to the floor below, and then took the wrench from

deceased's hand and inserted the handle of it in the brace. Deceased at the time was sitting on the I-beam with his legs crossed beneath it, and was stooping over, holding his end of the brace with both hands. The foreman, by means of the wrench, shook the end of the brace with such violence that it came out of the flange upon which it was resting, and, the rope having been removed, the brace fell and deceased was carried down with it. He struck on one of the three boards across the panel on the floor below and then fell to the basement, causing his death.

The original declaration, after setting out the relations of the deceased and defendant and the nature of the work at which deceased was engaged, alleges that the defendant's foreman "wantonly and negligently inserted a certain handle in a hole in said brace and then gave said brace a sudden and violent twist or shake with said handle, thereby displacing and throwing down the end of said brace which said Collins was attempting to place and fasten, and the said Collins was then and there thrown from the point where he was located, a great distance to and upon the ground," etc., whereby the injury was caused, resulting in the death of Lawrence Collins.

After a lapse of more than three years from the injury the plaintiff filed an additional count, a verbatim copy of the original declaration, except that after the word "negligently" and before the word "inserted," in the part of the declaration above quoted, the following words were inserted: "Unfastened a rope by which said brace was fastened and which would prevent its falling and."

The general issue was pleaded to the original declaration and to the additional count, and a plea of the two-years Statute of Limitations to the additional count was also filed. To the latter plea plaintiff demurred and the demurrer was sustained, the defendant electing to stand by his plea of the Statute of Limitations. At the close of the plaintiff's evidence, and again at the close

of all the evidence, defendant's counsel asked the court to instruct the jury to render a verdict of not guilty, which was denied.

GEORGE W. WALL, (PERCY WERNER, of counsel,) for appellant.

JAMES C. MCSHANE, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

Appellant urges that the verdict of the jury is against the preponderance of the evidence. There was a sharp conflict as to whether or not Kindt was foreman of the gang and whether or not the act was occasioned by contributory negligence. Appellant only claims that the verdict is against the preponderance of the evidence, and that the evidence of the brother of the deceased should not be given credence. The question of whether Kindt was a vice-principal or was a fellow-servant with appellee's intestate, and the question of contributory negligence, were fairly presented to the jury by proper instructions, and it is not our province to weigh the testimony and determine where the truth of it lies. There being testimony in this case, if believed by the jury, fairly tending to support plaintiff's right to recover, the court did not err in refusing to take the case from the jury.

We think the amended declaration did not state a new cause of action. The gist of both counts was the negligent shaking of the brace. The fact that the rope was untied was a mere incident in causing the brace to fall. The act which caused it to fall was the shaking it out of the flange. It no more stated a new cause of action than if the plaintiff had alleged in an additional count that the foreman negligently pulled the brace out of the flange with his hands, instead of negligently placing the wrench in a hole in the brace and shaking it out of the flange. This is not a case where the original declaration did not

state a good cause of action. Having stated a good cause of action plaintiff could amend his declaration at any time, so long as he did not charge a different cause of action. (*Swift & Co.* v. *Madden*, 165 Ill. 41.) The negligence did not consist in untying the rope. When the braces were placed in their proper position it became necessary to untie the rope. The brace was practically in its position and deceased was attempting to insert a bolt. As the hole of the I-beam and the hole of the brace were not in line, it became necessary to move the brace, and it was the negligent moving and shaking of the brace that was charged as the negligence in both counts. Had the foreman first shaken the brace and got it out of position and then untied the rope and caused it to fall, then the contention of appellant would have greater weight. But the primary act which caused the injury was the shaking of the brace, and under that allegation it would have been proper to have shown that the flanges were not wide enough or that the bolts were not strong enough, or that the position of the brace or beam, or the means by which the brace was suspended, were not in such condition as to justify the negligent shaking of the brace. (*Illinois Central Railroad Co.* v. *Aland*, 192 Ill. 37; *Ames & Frost Co.* v. *Strachurski*, 145 id. 192.) It might be shown under the original declaration, as a part of the *res gestæ*, that the rope had been loosened, and also as giving character to the shaking of the beam, and if it had been loosened by a fellow-servant or by the deceased himself, yet the negligent shaking of the brace by a vice-principal, which caused the injury, would support a verdict.

There was no error in sustaining the demurrer to the plea of the Statute of Limitations to the amended count.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE VILLAGE OF ALTAMONT
v.
M. S. CARTER.

Opinion filed April 16, 1902.

INSTRUCTIONS—*extent of requirement that jury base findings upon the evidence.* A requirement in the first part of an instruction that the jury must base their findings upon the evidence, extends to all subsequent clauses in the instruction and need not be repeated in each succeeding sentence.

Village of Altamont v. *Carter*, 97 Ill. App. 196, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Effingham county; the Hon. W. M. FARMER, Judge, presiding.

JACOB ZIMMERMAN, (WOOD BROS., of counsel,) for appellant.

WRIGHT BROS., and E. N. RINEHART, for appellee.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Fourth District, affirming a judgment for $1000 in an action on the case in the circuit court of Effingham county in favor of appellee, against appellant. The damages were alleged to have been occasioned by reason of an opening in a sidewalk on a street of the village, used for a coal chute or for lighting and ventilating a business house fronting on the street, into which appellee fell and was injured. The accident happened on the night of March 9, 1900.

The only errors urged in this court as grounds for reversal are, that the trial court misdirected the jury in instructions given for the plaintiff and erred in refusing to give certain instructions asked by the defendant. It is insisted that the first instruction given at the request

of the plaintiff assumes that he met with an accident which resulted in his injury, and that he was at the time in the exercise of due care for his own safety. In other words, that these essential elements of his cause of action are not left to be found by the jury from the evidence, but that by the instruction he could recover if the jury merely believed those facts, without reference to the testimony. The instructions are all very imperfectly abstracted, but as we understand this one the objection is not tenable. It states in the beginning that if the jury believe, from the preponderance of the evidence, that the sidewalk described in plaintiff's declaration was in an unsafe condition for use, and such condition was known to the officers of defendant, etc., so that all the facts necessary to plaintiff's right of recovery thereafter stated are made to depend upon the preponderance of the evidence. A requirement in the first part of an instruction that the jury must base their findings upon the evidence applies and extends to all subsequent clauses in the instruction, and it is unnecessary in each of the succeeding sentences to inform the jury that they must find from a preponderance of the evidence. *Miller* v. *Balthasser*, 78 Ill. 302; *Belden* v. *Woodmansee*, 81 id. 25; *Rock Island and Peoria Railway Co.* v. *Leisy Brewing Co.* 174 id. 547; *Gizler* v. *Witzel*, 82 id. 322.

The second and third instructions given for the plaintiff are subject to the criticism that they merely state abstract principles of law; but when considered in connection with others given, they could not have misled the jury to the prejudice of the defendant.

It is further objected that the court refused to give several instructions asked by the defendant, to the effect that if the jury found that the defect in the sidewalk had existed so short a time that the defendant, by the exercise of reasonable care and diligence, could not have known of it, then the verdict should be for the defendant. They were each properly refused, for the reason that the same rule of law was given in other instructions.

We have duly considered the objections urged to the ruling of the trial court in giving and refusing other instructions, and have been able to find no substantial error in that regard.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE CITY OF TAYLORVILLE

v.

MARY A. STAFFORD.

Opinion filed April 16, 1902.

1. EVIDENCE—*admissibility of proof of the condition of walk at places other than that of accident.* In an action against a city for injuries received by the plaintiff from falling over a stake which had been driven in the ground to fill a hole in a plank sidewalk and which had worked up above the level of the walk, evidence that there were other stakes in the same condition at other places in the walk is admissible, not to prove negligence by the city, but as tending to show that the city had notice of the condition of the walk, and that stakes so driven would work up above the level.

2. SAME—*when evidence of subsequent repairs is admissible in rebuttal.* If the plaintiff in a suit against a city introduces evidence as to the height above the sidewalk of the stake over which she stumbled, and the defendant proves a measurement taken after the injury from which the height appeared much less, the plaintiff may prove, in rebuttal, that the stake had been driven down before the taking of the measurement proved by the defendant.

3. SAME—*evidence that others had stumbled over the same stake is admissible.* In an action against a city for injuries received by plaintiff from stumbling over a stake in the sidewalk, evidence that others had stumbled over the stake is competent, not for the purpose of proving independent acts of negligence, but as tending to show that the common cause of the accident was dangerous.

City of Taylorville v. *Stafford*, 99 Ill. App. 418, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Christian county; the Hon. TRUMAN E. AMES, Judge, presiding.

LEROY ANDERSON, City Attorney, and HOGAN & DRENNAN, for appellant.

J. C. & W. B. MCBRIDE, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court for the Third District affirmed the judgment recovered by appellee against appellant in the circuit court of Christian county for injuries sustained by falling on a sidewalk.

It is assigned for error that the court admitted evidence on behalf of plaintiff of the condition of the sidewalk at other places than the one where plaintiff fell. The sidewalk was made of three twelve-inch planks running lengthwise and resting on cross-pieces, to which they were nailed. Early in the winter of 1898 a plank had become decayed at one end, and it was repaired by putting in a strip eighteen inches to two feet long to fill the space and nailing it in. The strip was not quite long enough to fill the whole space, and what the witnesses and counsel call a "staub" was driven into the ground at the end of the strip to fill it out. This staub was a peg or stake, and it was driven down flush with the top of the sidewalk and left in a safe condition. During the winter the stake worked up about two inches on account of the freezing and thawing of the ground, and it had been in that condition several weeks when plaintiff stumbled over it, on March 13, 1899. The evidence objected to was, that there were a considerable number of these stakes driven down in the sidewalk along the block where the accident occurred, and that at the time of the accident several of them were above the level of the sidewalk. The evidence was that the sidewalk was in fair order, except as to these stakes. The evidence was not admissible to prove negligence on the part of the de-

fendant. There was no dispute as to where the accident occurred, and the condition of stakes at other places did not affect the plaintiff in any way. She was not entitled to prove a general neglect of duty to the public respecting the care of sidewalks as a ground of recovery, and could only recover for an injury which resulted from the condition of the stake where she fell. It is sometimes, however, a material question whether a city has notice of the condition of one of its sidewalks, and that was the case here. The sidewalk, when repaired, was left in a safe condition, and it was necessary to prove actual or constructive notice that it had become unsafe. When that question is in dispute it is competent to show a general decayed, dilapidated and unsafe condition of a sidewalk, or other facts from which notice may fairly be inferred. For this reason we think it was competent to show that other stakes driven in the same walk were above the top of the sidewalk, as tending to show that the defendant had notice of such conditions in the sidewalk, and that a stake driven in the ground would be lifted by freezing and thawing so as to project above the sidewalk.

The court permitted plaintiff, in rebuttal, to prove that there had been a change in the condition of the sidewalk after the accident. The question of negligence is to be determined by the condition of the sidewalk before and at the time of the injury, and evidence of repairs afterwards is not admissible. Its effect ordinarily is to operate as an admission of negligence. (*Hodges* v. *Percival*, 132 Ill. 53; *City of Bloomington* v. *Legg*, 151 id. 9; *Howe* v. *Medaris*, 183 id. 288.) The testimony complained of in this case was not within the rule prohibiting such evidence. The plaintiff, in making out her case, introduced evidence as to the height of the stake above the sidewalk. The defendant proved a measurement taken afterwards, from which the height appeared to be much less than that testified to by plaintiff's witnesses. Plaintiff was then permitted, in rebuttal, to introduce the evidence in

question, that the stake had been driven down before the measurement proved by defendant. It was competent to show a changed condition.

Plaintiff was also allowed to introduce evidence that others had stumbled over the stake. It was held in *City of Bloomington* v. *Legg*, *supra*, that such evidence is competent, not for the purpose of showing independent acts of negligence, but as tending to show that the common cause of the accidents is a dangerous and unsafe thing.

Instruction No. 4 given at the request of the plaintiff is conceded to be correct as a proposition of law, but it is argued that it should not have been given because there was no evidence on which to base it. It related to notice to a city where it has repaired a sidewalk and left it in an unsafe condition. The sidewalk was level and safe when the repairs were completed and only became unsafe some time afterward, and there was no controversy on that question. There was no evidence to base the instruction on. It is also true, as claimed by counsel, that instruction No. 12 given at the request of plaintiff had no connection with the case. It was to the effect that it is not the duty of citizens to notify cities of obstructions. As has been so often said, the object of instructions is to enable the jury to apply the law to the facts in the case before them. It is not proper for the court to expound to the jury the law applicable to other situations and other states of fact, or to give instructions merely for educational purposes. The instructions as to what would be notice in some other case or as to civic obligations should not have been given, but we cannot see that any injury could have come from giving them.

Instruction No. 7 given to the jury is objected to as misleading, in relieving the plaintiff of any duty on her part to look out and avoid danger. The only point about the instruction is, that if plaintiff did not know of the defect she had a right to presume the walk to be in a reasonably safe condition for one traveling over it in

the exercise of reasonable care. It is not subject to the objection made.

Complaint is made of the refusal of three instructions asked by the defendant, but upon examination we find that the jury was fully and fairly instructed, and the instructions refused were argumentative in form and otherwise objectionable.

We find no error in the record which would justify a reversal of the judgment. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Mr. JUSTICE RICKS, having been of counsel in this case below, took no part in its decision here.

CLARA L. WELLS *et al.*

v.

BERNARD F. ROGERS *et al.*

Opinion filed April 16, 1902.

1. APPEALS AND ERRORS—*case must relate directly to revenue to give Supreme Court jurisdiction.* In order to give the Supreme Court jurisdiction of a direct appeal under the provision of section 88 of the Practice act, concerning appeals in cases involving revenue, the case must relate to the revenue directly, and not merely incidentally or remotely.

2. SAME—*when the Supreme Court cannot entertain an appeal.* The Supreme Court cannot entertain a direct appeal from an order denying an injunction and dismissing the bill, where the bill is to enjoin payments under a contract for a local improvement upon the grounds that the character and quality of the work and materials are inferior to those required by the ordinance and contract, that certain of the work was done at a fixed price and not by competitive bidding, and that the specifications contained anti-alien-labor and eight-hour-day clauses.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

ARTHUR B. WELLS, and JOHN M. BLAKELEY, for appellants.

CHARLES M. WALKER, Corporation Counsel, EDGAR B. TOLMAN, ROBERT REDFIELD, and WILLIAM M. PINDELL, for appellee.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

On July 6, 1899, the city of Chicago passed an ordinance for the grading and paving of Clinton street from the south curb line of West Lake street to the north line of the street railway right of way on VanBuren street, etc. Afterwards the board of local improvements entered into a contract with the appellee the Gaffney & Long Construction Company for the doing of the work and furnishing the material for said improvement. On August 2, 1901, appellants filed their bill in the superior court of Cook county against appellees, by which they prayed to have the contract between the board of local improvements and said contractor, the Gaffney & Long Construction Company, declared void, and to have the said board of local improvements enjoined from making any payments on account of the work done and being done under said contract, or issuing any bonds or vouchers therefor chargeable to the funds to be raised under the special assessment levied to pay for such improvements. The bill was sworn to and certain *ex parte* affidavits attached to and filed therewith, upon which the complainants moved for a temporary injunction. The defendants were duly notified, and they filed counter-affidavits denying the facts set up in the bill. The court denied the motion for an injunction and dismissed the bill at the complainants' costs. To reverse that decree the complainants below have prosecuted this appeal, bringing the case directly to this court.

At our October term, 1901, the appellees appeared by their counsel and entered their motion to dismiss the ap-

peal for want of jurisdiction in this court, and in support thereof presented suggestions and cited authorities. No objections or counter-suggestions to that motion were filed by appellants, and the motion was taken with the cause and its final disposition reserved to the hearing.

The allegations of the bill upon which the prayer for relief is based are, in substance, as follows: First, the character and quality of the work and materials in the construction of the improvement were defective and inferior to those required by the ordinance and contract; second, certain work in reference to the catch-basins was done at a fixed price, and not by competitive bidding; third, the specifications contained a clause forbidding the employment of alien labor; and fourth, said specifications contained a clause constituting eight hours a day's labor. As above stated, the affidavits filed in support of and against the motion for a temporary writ of injunction simply tended to prove or disprove these averments.

Manifestly, complainants have mistaken the court to which their appeal should have been taken. There can be no pretext that a franchise, freehold, validity of a statute or construction of the constitution is here involved. The only possible claim of jurisdiction in this court must be that the case relates to the revenue. But we have held that in order to give this court jurisdiction under that provision of section 88 of the Practice act the case must relate to the revenue directly, and not merely incidentally or remotely. (*Hodge* v. *People*, 96 Ill. 423; *Board of Supervisors of Shelby County* v. *People ex rel.* 159 id. 242.) The most that can be said of the case made by this bill is, that the revenue might be incidentally or remotely affected by the result. Without expressing any opinion, therefore, as to the merits of the case, the appeal will be dismissed.

Appeal dismissed.

GEORGE M. PECK

v.

THE MCCORMICK HARVESTING MACHINE COMPANY.

Opinion filed April 16, 1902.

ACTIONS AND DEFENSES—*breach of contract within Statute of Frauds no defense to suit on note.* The breach of an oral agreement within the Statute of Frauds cannot be set up as a defense by way of recoupment for damages to an action on a promissory note.

Peck v. *McCormick Harvesting Machine Co.* 94 Ill. App. 586, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

This was a suit by appellee on a promissory note for $2000, made by S. W. Chapman as principal and by the appellant, George M. Peck, as surety. The cause was tried upon one special count and the general issue. The defense to the note was, recoupment for damages sustained by appellant's principal, S. W. Chapman, for the breach of an oral contract between Chapman and the appellee.

It was shown by the evidence that S. W. Chapman and the president of the appellee company, C. H. McCormick, had a conversation on May 3, 1893, in which this alleged oral contract was talked about. Chapman had been appellee's general agent for Elgin and vicinity, and being in poor health wished to give up the agency. McCormick wanted to know what was to be done with the stock of machinery, vehicles, etc., on hand at Elgin, which was carried for the purpose of helping the sale of appellee's machines but was not of appellee's make. Chapman replied that if he could have a long time to pay for it, and a low rate of interest, and the exclusive sale of appellee's machines during the life of the notes he would give for

the purchase money and until they should be paid, and the use of the warehouse, he would buy the stock himself. McCormick said that he wanted him "to continue one of the family" and sell appellee's machines at Elgin and vicinity exclusively. He said that the company would not think of selling to him unless he did, or something to that effect, and told him to go ahead and take the inventory. The inventory was made and five notes were given by Chapman to the company, payable in one, two, three, four and five years, the aggregate amount of which was the amount of the inventory, less ten per cent for depreciation. Chapman was to be local agent and sell on commission. Chapman testified he supposed the contract would be reduced to writing. McCormick said at the time that Chapman would have to make an annual contract, the same as every local agent had to make. The commissions were regulated each year, because they changed. Some years the prices were lower than in others, and nothing was said about commissions or price of the machinery to be sold for appellee. A new written contract was made with Chapman every year, without which he could not have sold appellee's machinery. Four such annual contracts were made, but appellee refused to make a contract with Chapman for 1897,—the fifth year,—and that year invaded the territory assigned to Chapman in 1896, by furnishing its machinery to other agents to sell. Appellee refused to give him a contract for 1897 because he had taken a partner who was selling a rival machine, which was in violation of his agreement in the annual contracts not to be interested, directly or indirectly, in the sale of any rival machine. All the notes given by Chapman were paid, except the one on which this suit was brought. Appellee's defense to the oral contract was the Statute of Frauds, and that it was indefinite and uncertain.

At the conclusion of the evidence the trial court instructed the jury to find for the plaintiff and rendered

judgment on the verdict. On appeal this judgment was affirmed by the Appellate Court for the First District.

BOTSFORD, WAYNE & BOTSFORD, for appellant.

JOHN C. EDWARDS, and WILLIAM T. UNDERWOOD, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Inasmuch as there is no plea of failure of consideration, wholly or in part, we need not consider whether the consideration for the note sued on had failed or not. The case was tried on the general issue, and no question is raised on the pleadings. The questions presented by counsel are, whether there was such an oral contract between Chapman and appellee as is alleged by appellant, and if there was, whether it was void, as in violation of the Statute of Frauds. Appellant insists there was such a contract, and that he is entitled to recoup to the extent of the damages sustained by Chapman caused by appellee's breach of such contract in invading Chapman's territory in 1897 and in refusing to make a contract with him for 1897. Appellee insists that the oral contract was incomplete and was too indefinite to be enforced, but that if it were considered sufficiently definite, still, neither party could perform it within one year, and that the contract being within the Statute of Frauds, no suit could be maintained for a breach of it and no recoupment could be had in this action.

It is clear that the contract could not have been performed within the year. We are therefore unable to see how the defendant could have damages by way of recoupment for the breach of it by the plaintiff. (*McGinnis* v. *Fernandes*, 126 Ill. 228; *Butcher Steel Works* v. *Atkinson*, 68 id. 421.) Giving the appellant full benefit of all the testimony in the case, he has proved only an oral contract within the Statute of Frauds, and has consequently presented no legal defense to the action, even if such con-

tract were considered sufficiently definite to be otherwise enforceable. It follows that there was no error in instructing the jury to find for the plaintiff the amount due on the note.

The judgment will be affirmed.

Judgment affirmed.

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

IDA G. PETTERS.

Opinion filed April 16, 1902.

1. INSTRUCTIONS—*when instruction is calculated to mislead jury.* An instruction which selects one item of evidence, or one fact disclosed by the evidence, and states that a certain conclusion does not follow, as a matter of law, from such fact, is calculated to mislead and confuse the jury.

2. SAME—*when instruction in action against street railway is properly refused.* In an action against a street railway company, an instruction is properly refused which holds that "no presumption of negligence arises against the defendant from the mere fact that the plaintiff was injured in connection with the defendant's cars."

3. SAME—*instruction should be based upon the evidence.* It is not error to refuse an instruction which is not based upon the evidence.

4. SAME—*when objection to instruction is not well taken.* An instruction authorizing the jury to find for the plaintiff, under certain facts, if they believe plaintiff was injured "by reason of the *alleged* negligence of the defendant," is not subject to the objection that the jury could find for the plaintiff if she was injured by any act of the defendant alleged to be negligent.

5. STREET RAILWAYS—*cars should approach street crossings under control.* Those in charge of a street car should so regulate its speed that a collision with a person having the right to cross the street may be avoided by the exercise of ordinary care.

West Chicago Street Railroad Co. v. *Petters*, 95 Ill. App. 479, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding.

JOHN A. ROSE, and LOUIS BOISOT, (W. W. GURLEY, of counsel,) for appellant.

FRANCIS J. WOOLLEY, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an action on the case by Ida G. Petters against the West Chicago Street Railroad Company, brought in the superior court of Cook county, to recover damages for personal injuries alleged to have been received through the defendant's negligence. The jury found the defendant guilty and assessed the plaintiff's damages at $10,000. The superior court required the plaintiff to remit half of this verdict, whereupon a judgment was rendered against the defendant for the sum of $5000, which has been affirmed by the Appellate Court.

It appeared from the evidence that the accident occurred about ten o'clock Sunday night, February 24, 1898, on West Twelfth street near its intersection with Millard avenue, in the city of Chicago. The plaintiff, in company with a young man named Butterworth, was driving along in a slow trot in the west-bound track of appellant toward the west, when without warning a car of appellant running at full speed came up behind. Becoming aware too late of the proximity of the car, Butterworth, who was driving, pulled his horse toward the south, when the car crashed into the back of the cutter, breaking the cutter and throwing out both occupants so violently that Butterworth was killed and plaintiff seriously injured. The evening of the accident was clear and cold. The moon was shining, and the cutter could be seen a block or more away. A cold wind with a slight snow was blowing from the north-west, and the motorman had on a fur coat with a collar turned up as high as his cap and had his eyes "all shut in except directly in front," and was protecting his face against the north-

west wind and snow, and for this reason the motorman failed to see the cutter until an instant before the accident, when it was too late to warn the occupants of the sleigh or to take any measure to avoid the accident.

The only errors urged by appellant in this case for reversal are the refusal of the court to give appellant's instructions 19 and 24, and the giving of appellee's fourth instruction. The defendant's refused instruction 19 is as follows:

"The court instructs the jury that no presumption of negligence arises against the defendant from the mere fact, of itself, that the plaintiff was injured in connection with the defendant's cars."

We think the appellant was not prejudiced by the refusal of the trial court to give this instruction to the jury. This class of instructions, which select one item of evidence or one fact disclosed by the evidence and state that a certain conclusion does not follow, as a matter of law, from that fact, are calculated to mislead and confuse a jury. The case of *Drainage Comrs.* v. *Illinois Central Railroad Co.* 158 Ill. 353, was reversed on this character of instructions. If an instruction of this nature were held proper, it would be possible for a defendant to select each "mere fact" constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, and while each particular link might not, of itself, constitute negligence, yet the whole, taken together, would, and thereby the court would be enabled to instruct the jury on the facts and take away the consideration of facts from them.

Instruction 19 was also covered by the defendant's instruction No. 6, which told the jury that the plaintiff could not recover unless they found, from the evidence, that at the time of the accident she was in the exercise of ordinary care for her own safety and that the defendant was guilty of negligence in the manner charged in

the declaration, and that such negligence was a proximate and direct cause of the plaintiff's injury. This, we think, substantially included all that was requested in instruction 19.

Appellant's instruction numbered 24 was as follows:

"The court instructs the jury that while the defendant, in operating its said car at the time and place in question, was bound to have regard to the rights and safety of others, yet it was not obliged to be all the while on its guard against the not reasonably to be expected, the unusual and extraordinary; and if the jury believe that the crossing of the track by the sleigh in which the plaintiff was riding, if it did cross the track, was, under all the circumstances in evidence, extraordinary, not reasonably to be expected or unusual, then it became the duty of the defendant to stop its car only so soon as the servant or servants in charge thereof had notice or knowledge, or by the exercise of ordinary care could have had notice or knowledge, of such crossing of the track by the said sleigh; and if the jury further believe, from the evidence, that such notice or knowledge was insufficient for the said servant or servants, by the exercise of ordinary care, to stop said car without injuring the said plaintiff, then the jury must find the defendant not guilty."

We think appellant was not prejudiced by the failure of the court to give its twenty-fourth instruction. There is no evidence in the record that the crossing of the track, if it was crossed by the sleigh, was unusual and extraordinary, and as there was no evidence on which to base the instruction it is an elementary principle of law that it was not error to refuse it. The sleigh was struck practically on the crossing of Millard avenue,—the evidence tends to show within nine feet of the west line; and the evidence also shows that this car in question had crossed Millard avenue at a high and dangerous rate of speed without having given any warning of its approach

or without having slowed down, or without having placed the car under proper control to avert just such an injury as occurred in this case. It was the duty of appellant and its servants in approaching crossings to so regulate the speed of its cars that collisions with other persons having the right to cross such streets could, by the exercise of ordinary care, be avoided. (Booth on Street Railways, sec. 306; *West Chicago Street Railroad Co.* v. *McCallum*, 169 Ill. 240; 2 Thompson on Law of Negligence, sec. 1399.) The instruction offered ignores this duty of the appellant, and if given would have justified the appellant in approaching and crossing Millard avenue at a high and dangerous rate of speed without warning to other persons crossing or about to cross the same, and only have held appellant liable for its failure to use ordinary care after the discovery of such persons crossing to avoid collision, when no degree of care, with the ordinary appliances of such carriers, could have been sufficient to have avoided the accident. This instruction was also covered by the eighth instruction given on behalf of appellant, which instructed the jury that if they believed, from the evidence, that the sleigh was driven in front of the car so suddenly that the motorman had no notice of any danger to the occupants of the sleigh, so as to give him an opportunity to avoid the danger by the exercise of presence of mind and the use of such ordinary care as is to be expected under such circumstances as were then surrounding him, and that the car was being operated with ordinary care, then the plaintiff could not recover.

Twenty instructions were given by the court to the jury, covering every phase of the case, and the giving of defendant's refused nineteenth and twenty-fourth instructions would have been repetitions of rules of law stated in the other instructions. It was never contemplated, under the provisions of the Practice act, that the court should be required to give a vast number of instructions, amounting, in the aggregate, to a lengthy address. A

few concise statements of the law applicable to the facts are all that can be required and are all that can serve any practical purpose in the elucidation of the case, and although the court may have refused proper instructions, yet the verdict will not always be disturbed for that reason alone. *Adams* v. *Smith*, 58 Ill. 417.

The fourth instruction given for the appellee was as follows:

"If the jury find, from the preponderance of the evidence, that the plaintiff was injured, as charged in her declaration, by reason of the alleged negligence of the defendant, and that at and before the time of receiving such injury the plaintiff was in the exercise of ordinary care and caution for her own safety, and that when injured she was riding in the cutter in question as the invited guest of Mr. Butterworth, then, even though it should appear that said Butterworth was guilty of some want of care that contributed in some measure toward the bringing about of the accident in question, such want of care, if any, on the part of said Butterworth, will not be imputable to the plaintiff."

The only objection raised to this instruction is of the use of the word "alleged." It is contended by appellant that under this instruction, if the jury concluded, from the evidence, that the plaintiff had been injured by an act of the defendant, and that such act was alleged to be negligent, they then might reconcile it with their consciences to find a verdict for the plaintiff in reliance upon this instruction. We think this contention is frivolous. We cannot see how, by any possible means, the jury could have been misled by the use of the word "alleged." It simply meant that the court was non-committal upon the question of whether there was or was not negligence, and it referred back to the declaration. The plaintiff could recover only for the negligence that was by her alleged, and if the proof showed other or different negligence she would have to amend her declaration and allege it. In

our view the instruction would have been as much subject to criticism if the word "alleged" had been omitted.

It was not reversible error to refuse the instructions asked.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

ELIZA O'FLAHERTY

v.

MARGARET MANN *et al.*

Opinion filed April 16, 1902.

1. PROPOSITIONS OF LAW—*proposition calling for opinion on question of fact is properly refused.* A proposition submitted as a proposition of law but which calls for the opinion of the court upon a question of fact is properly refused.

2. LIMITATIONS—*when Statute of Limitations will be applied.* If a land owner permits the owner of adjoining land, in fencing his land, to enclose a portion of her land and keep the same, claiming title co-extensive with the enclosure for twenty years, the bar of the Statute of Limitations will be applied.

3. SAME—*what does not suspend running of Statute of Limitations.* If the owner of land encloses a strip of adjoining land with his own, claiming ownership, planting trees and exercising other open acts of ownership, the fact that he enters into possession of the remainder of the tract on the other side of the fence under a lease does not suspend the running of the statute in favor of his possession of the strip over which he is exercising acts of ownership.

APPEAL from the Circuit Court of Kane county; the Hon. GEORGE W. BROWN, Judge, presiding.

BOTSFORD, WAYNE & BOTSFORD, for appellant.

RUSSELL & HAZLEHURST, for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an action in ejectment, originally begun in the city court of the city of Elgin, where a trial was had and a judgment rendered for plaintiffs. A new trial was taken

under the statute and the venue was changed to the circuit court of Kane county, where, upon trial before the court without a jury, judgment was again rendered for plaintiffs.

The evidence produced on the hearing is very conflicting. On March 17, 1866, the appellant purchased from John Waite the west half of lot 1 in block 26, in Kimball's third addition to Elgin, and on March 14, 1868, Michael Mann received a deed of conveyance of lot 3, in the same block, from the same grantor. The evidence tends to show he was in possession of and built on said lot about the year 1866. Lot 3 is immediately north of and adjoins lot 1. Michael Mann was a brother of appellant, the husband of Margaret Mann, one of the appellees, and the father of the other appellees. It appears from the evidence that shortly after Michael Mann purchased lot 3 there was one continuous fence erected around that lot and the west half of lot 1. It further appears from the greater weight of the testimony that in the year 1867 or 1868 there was a partition fence erected about forty-seven feet south of the southerly line of lot 3 as Kimball's addition was platted and recorded, thereby including that much of appellant's lot 1 with Michael Mann's lot 3. The evidence also shows that this partition fence was a direct continuation of the partition fence between lots 2 and the easterly half of lot 1. The evidence shows that lot 1 was as long as and lay south of lots 2 and 3. Shortly after Michael Mann went into possession of lot 3 he enclosed the same, including the forty-seven feet which he had fenced off and which was platted as a part of lot 1. This forty-seven foot strip is the tract of ground that is involved in this controversy. Appellees claim title to the same as devisees of Michael Mann, who, they claim, acquired title by twenty years' adverse possession. It appears from the greater weight of evidence that appellant was never in possession of that part of lot 1 north of the division fence. For four

or five years after Mann purchased lot 3 the appellant herself cultivated the west half of lot 1 up to this division fence, and planted it in corn, oats and potatoes. After she had thus held possession of lot 1 until 1872 or 1873, it seems that she entered into an understanding with Michael Mann that in consideration of his keeping the fences in repair he might have the use of the west half of lot 1, and thereafter Mann seemed to have control and possession, with her permission, of that part of lot 1. It further appears, from the evidence, that Mann made little or no use of lot 1. In fact, the only evidence tending to show any use on his part was the occasional pasturing of horses and colts thereon. Michael Mann erected a house on the north-east corner of lot 3, and planted one or more rows of trees on his side of the division fence and on the forty-seven foot strip of ground in controversy. The original partition fence, which seems to have been built in 1867 or 1868, was a four-plank fence, and a few years thereafter Michael Mann and one of his sons planted a hedge fence practically upon the line of the board fence. This hedge fence remained there until a short time before this suit was begun, when two sons of appellant, by and under her direction, cut down the hedge and plowed up the forty-seven foot strip. It is contended by appellant that this partition fence was not put in by Michael Mann until after she had surrendered the use of the premises to him, but the preponderance of the evidence is that this fence was erected shortly after Michael Mann bought, and was there for several years while the appellant herself was cultivating the west half of lot 1.

It seems clear from the evidence that the original possession of Michael Mann of the forty-seven foot strip in controversy was hostile and adverse and open in its inception, and the main question for determination is whether or not such possession continued for the statutory period. Mann held this strip from 1868 until about 1898, and the only thing to defeat his possession would

be the effect of the alleged leasing by Mann from the appellant of that part of lot 1 which lay south of the fence, from 1872 or 1873 to his death.

It is also contended by appellant that the court erred in refusing appellant's first, second, third, fourth, fifth, sixth, seventh and eighth propositions of law, and in modifying the fifth instruction. These propositions all call for the opinion of the court upon a question of fact, and the facts stated in each instruction are disproved by the preponderance of the evidence. The facts are not stated hypothetically in these propositions, nor is the opinion of the court as to the law arising thereon asked, but the court, if it held the propositions, was compelled to assume the facts therein stated as established. This is improper. When a proposition calls for the opinion of the court upon a question of fact it may properly be refused. *County of LaSalle* v. *Milligan*, 143 Ill. 321.

We think the evidence in this case plainly shows that when Mann first went into possession of this lot he claimed that his possession extended to the line on which he placed his fence, and that his possession at that time was plainly hostile to that of appellant. This possession, by the fence and the acts of ownership which he exercised over the strip in question, was an actual, visible and exclusive possession, and was acquired and retained under a claim of title inconsistent with that of appellant. There can be no question but that such possession was held until 1872 or 1873, when he took possession of both lot 3 and the west half of lot 1, but from the time he so took possession the evidence shows that he exercised different acts of ownership over lot 3 than he did over lot 1. On this forty-seven foot strip he planted a row of apple trees, which at the time of the trial were from twelve to eighteen inches in diameter. The fence on the south part of the forty-seven foot strip becoming decayed, there was substituted in place of it, as a marked, well-defined boundary between the two tracts of land,

this hedge fence, and this fence was permitted to remain there as a boundary line and under the original possession of Mann without any complaint on the part of the appellant. There could be no doubt but that he claimed the right of possession to the partition fence. It seems that at the time the fence was first put there appellant acquiesced in all the rights of ownership which Mann claimed to possess. Nor was there objection on appellant's part, at any time, to such open and adverse claim until about the year 1898, when, without notice to any one, she had the fence cut down and the strip in controversy plowed up. It is said in *McNamara* v. *Seaton*, 82 Ill. 498, that if an adjoining owner would suffer another, in fencing his land, to enclose a portion of the adjoining tract and keep the same, claiming title co-extensive with the enclosure, for twenty years, no reason is perceived why the bar provided by the statute would not be applied. The mere fact that Mann entered into possession of lot 1 under a lease or by license of the appellant five or six years after he had enclosed with lot 3 the strip in controversy, would constitute no reason why the running of the statute should be suspended, when the original holding of this strip was open and adverse and distinct acts of ownership were continuously exercised by Mann over it up to the time of his death. The evidence as to the use of the appellant's lot by Michael Mann is, that in 1872 or 1873, or some time near there, the appellant quit farming her lot and put the same down in grass; that the fences began to go down for want of attention, and that Michael Mann called her attention to that fact, and an arrangement was made by which he was to keep the fences in repair for the use of the lot. This is the only and the whole arrangement under which he exercised any right or received any benefit of the part of the lot south of the hedge fence grown by him. Had there been no partition fence or acts of ownership exercised by Mann over the strip there might then have been no adverse

possession for twenty years, but from his conduct it is plain that he claimed ownership over this strip, enclosed it with his own, laid it out and improved it with an orchard,—such acts as established a plain, open and visible claim of ownership on his part; while, on the other hand, his use of appellant's lot was no more than an occasional pasturing of a horse or two, or some colts. The character of the possession by Mann over these two lots was so different and distinct and so plainly visible to appellant, and the entire character of his possession of the strip in controversy so inconsistent with her title, that it seems to us that it constituted every element necessary to bring it within the Statute of Limitations.

It further appears, from the evidence, that about 1877 or 1878 Mrs. O'Flaherty became of opinion that she did not have as much land as she was entitled to, and she placed the fence on the south line of lot 1 about fifty feet out, into Summit street, held the same by possession against the city, and the same was thereafter bought from her by the city. It is claimed by appellees that she would be estopped from claiming the strip of land in controversy by reason of the fact that she elected to hold, and did hold, the fifty feet on the south end of lot 1. While such act on her part may not, in law, amount to an estoppel, it is a very strong circumstance tending to show that she recognized the fence placed by Michael Mann between their lots as his south and her north line. It is such a circumstance as could not well have arisen without bringing full knowledge to her of the line as insisted upon by Michael Mann, and the land thus acquired by the extension of her fences south she sold to the city for street purposes for $200.

The evidence is contradictory and hard to reconcile, and after a careful review of all the evidence we are not able to say that the trial court erred in the conclusion reached, and the judgment is affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* M. Slusser, State's Attorney,

v.

E. H. GARY *et al.*

Opinion filed April 16, 1902.

1. ELECTIONS—*effect where law prescribes both time and place for holding election.* If both the time and place of holding an election are prescribed by law, every voter is presumed to take notice of the law and to deposit his ballot at the time and place appointed, since the right to hold the election in such case is derived from the law, and not from the clerk's notice.

2. SAME—*section 15a of the Drainage act applies to elections in union districts.* Section 15a of the Farm Drainage act, as added in 1895, (Laws of 1895, p. 167,) providing that elections shall be held on the second Saturday in March of each year, between the hours of two and six o'clock P. M., applies to drainage districts lying in two towns as well as those lying in one town.

3. PLEADING—*what not essential to plea setting up election of drainage commissioners.* If a plea to a count in an information in *quo warranto* attacking the election of respondents to the office of drainage commissioners alleges that notices of the election were posted more than ten days before the day for holding the election, and names the day, it is not necessary that it name the hours for holding the election, since the hours are prescribed by statute.

4. SAME—*when mistake in date may be rejected as surplusage.* If a plea in *quo warranto* alleges that notices of an election for drainage commissioners were posted "for more than ten days prior to the said 14th of March, 1897, the day for holding said election," the fact that the date should have been March 13 does not render the plea bad, since the date may be rejected as surplusage, leaving the averment to read, "for more than ten days prior to the day for holding said election."

5. SAME—*when allegation as to taking oath of office is sufficient.* A plea setting up the facts as to the respondents' election to the office of drainage commissioners, which alleges that they "took the oath of office required by the statute," is sufficient without alleging specifically that the oath was taken before a proper officer and setting forth the substance of the oath, since the form of oath is prescribed by statute, and no other oath is necessary.

6. SAME—*when plea need not set forth organization of drainage district.* Where one count of an information in *quo warranto* proceeds upon the assumption that the election of the respondents to the office of drainage commissioners was invalid, a plea to such count which presents only the one issue, which is as to the validity of

the election, need not set forth the proceedings for the organization of the district.

7. SAME—*party may reply to pleas though his demurrer is overruled.* Although, by failing to stand by a demurrer to a plea after it has been overruled, the sufficiency of the plea, in law, to bar a recovery is admitted, yet the pleaders may by replication make an issue of fact upon the allegations of the plea.

8. SAME—*when it is error to sustain demurrer to replication.* In *quo warranto* to test the legality of the organization of a drainage district, the jurisdictional facts as to the signing of the petition and the holding of adjourned meetings may be inquired into, and although such facts are alleged in the respondent's plea, yet they may be denied by replication; and it is error to sustain a demurrer to the replication upon the ground that it seeks to impeach the record as set up in the plea.

9. SAME—*effect where certiorari proceeding is set up in bar of quo warranto.* Where a plea in *quo warranto* to test the legality of the organization of a drainage district alleges certain previous *certiorari* proceedings and attempts to set up the same as in bar of the action in *quo warranto*, the petitioner may by replication deny that the record in the *certiorari* proceeding was a true one.

10. QUO WARRANTO—*judgment in certiorari is not a bar to quo warranto.* The legality of the organization of a drainage district can be attacked only by a direct proceeding by *quo warranto*, and hence a prior judgment in *certiorari* proceedings affecting the same district cannot be set up as in bar of an action of *quo warranto.*

11. SAME—*Attorney General may file information against a drainage district at any time.* A drainage district is a public corporation, and the Attorney General or State's attorney may, where the rights of the public are involved, file an information in the nature of *quo warranto* to test the legality of the organization of the district, without regard to the lapse of time since its organization.

APPEAL from the Circuit Court of DuPage county; the Hon. HENRY B. WILLIS, Judge, presiding.

This is an information in the nature of a *quo warranto*, filed on leave in the circuit court of DuPage county by the State's attorney of that county against E. H. Gary, Jesse C. Wheaton and John Weisbrook, appellees, requiring them to show by what warrant and authority they claim, that there is such a drainage district as Union Drainage District No. 1 of the towns of Milton and Winfield in said DuPage county, Illinois, and by what warrant

and authority they claim to hold and execute the said office of drainage commissioners of said alleged Union Drainage District No. 1 of the towns of Milton and Winfield in said DuPage county.

The information contains two counts. The first count challenges the organization of the drainage district. The second count relates to the election of the drainage commissioners of the district, who were in office at the time of the filing of this information.

To the second count of the information, the appellees filed one plea relating to their election and qualification as drainage commissioners. To this plea the appellant demurred. The demurrer was overruled, and the appellant electing to stand by the demurrer, the court below quashed the second count of the information, and dismissed the *quo warranto* proceedings, so far as they related to that count. To this ruling and order of the court, the People, by the State's attorney of said county, duly excepted and prayed an appeal to this court.

To the first count of the information the appellees filed three pleas. The first sets up the proceedings had in organizing the district; the second, the proceedings had and judgment rendered in certain *certiorari* proceedings in the circuit, Appellate and Supreme Courts; and the third plea sets up an estoppel by alleged delay and *laches* and limitation on the part of the People. Each of these pleas was demurred to by the appellant, and the court overruled the demurrers. Thereupon, the appellant filed replications to the pleas denying that the said union district No. 1 of the towns of Milton and Winfield, DuPage county, Illinois, was lawfully and duly organized, and existing as such when the information was filed; and alleging that the record and proceedings, as amended in the *certiorari* case, were false and fraudulent, and were not a true record of the proceedings had in reference to the drainage district, etc.; and denying that there was any such estoppel by *laches*, etc., as was claimed

by the appellees. Besides the original replications filed to the three pleas to the first count of the information, additional replications were filed. To all of these replications the appellees filed demurrers. The demurrers to these replications were sustained by the court. The People, by the State's attorney, elected to stand by the replications, and thereupon the court quashed the first count of said information, and dismissed said *quo warranto* proceedings; and to this ruling and order of the court the People, by the State's attorney, excepted and prayed and perfected an appeal to this court.

M. SLUSSER, State's Attorney, (HOPKINS, DOLPH & SCOTT, of counsel,) for appellant:

Elections must be held at the time and place provided in the statute. *Stephens* v. *People*, 89 Ill. 343; *Snowball* v. *People*, 147 id. 260; *Simons* v. *People*, 18 Ill. App. 588.

The statute provides that drainage commissioners shall take an oath of office, and that the same shall be taken before some officer authorized to administer oaths. Drainage act, chap. 42, sec. 15*a*.

The plea, in speaking of the election of each of the above named appellees, states that the elections were held on due notice, etc. This is a conclusion, and not a fact. A plea in a *quo warranto* case must state the facts. *Carrico* v. *People*, 123 Ill. 203; *Clark* v. *People*, 15 id. 217.

This being a proceeding by information in the nature of a *quo warranto*, appellees were obliged either to disclaim, in which case the People were at once entitled to judgment, or to justify, in which case it was their duty to set out their title specifically. It is not enough to allege generally that they were duly elected to office. It is necessary to state particularly how they were elected and how the school district of which they claimed to be directors had been formed. *Carrico* v. *People*, 123 Ill. 203.

A plea to an information in the nature of *quo warranto* must aver facts, and not conclusions; and those facts

must be set out specifically. *Carrico* v. *People*, 123 Ill. 200; *Rayfield* v. *People*, 144 id. 332; *Howard* v. *Drainage Comrs.* 126 id. 54; *Allman* v. *Drainage Comrs.* 55 Ill. App. 22; *Kamp* v. *People*, 141 Ill. 9; *People* v. *Drainage District*, 181 id. 179.

The land owners' petition to form a drainage district is necessary and jurisdictional. *Carrico* v. *People*, 123 Ill. 204; *O'Connel* v. *Railroad Co.* 184 id. 308; *People* v. *Cooper*, 139 id. 463; *Moore* v. *Baker*, 35 id. 382.

Where an adjourned meeting is required by law the record must show that it was held. *Comrs. of Highways* v. *Harper*, 38 Ill. 109; *Comrs. of Highways* v. *Wood*, 62 id. 391.

There must be a strict compliance with the law where the property of the individual is to be interfered with. The provisions are in the nature of conditions precedent, and the party claiming authority must affirmatively show compliance. *Hyslop* v. *Finch*, 99 Ill. 171; *Poole* v. *Breese*, 114 id. 594.

The legality of the organization of a corporation can be attacked judicially, and examined only by a direct proceeding by *quo warranto*. *Osborn* v. *People*, 103 Ill. 224; *Blake* v. *People*, 109 id. 504; *Keigwin* v. *Drainage Comrs.* 115 id. 347; *Renwick* v. *Hall*, 84 id. 162; *Evans* v. *Lewis*, 121 id. 475; *People* v. *Jones*, 137 id. 35.

Certiorari does not lie for the purpose of determining whether a drainage district has a legal existence. If the petitioner desires to call in question the validity of the organization of the district he must proceed by *quo warranto*. *Lee* v. *Drainage Comrs.* 125 Ill. 47.

On *quo warranto* the inquiry is much broader, and the facts may be inquired into, whether of record or not. *People* v. *Koerner*, 21 Ill. 67; *People* v. *Forquer*, Breese, 110.

Certiorari only goes to the face of the record. The truth of the record in *certiorari* cannot be inquired into, but in *quo warranto* the truth of the record can be inquired into. *Lee* v. *Drainage Comrs.* 125 Ill. 47; *Drainage District* v. *Griffin*, 134 id. 330; *Drainage District* v. *Volke*, 163 id. 243; *People* v. *Peoria*, 166 id. 520.

BOTSFORD, WAYNE & BOTSFORD, for appellees:

The allegations in appellees' plea that notice was given for the election for drainage commissioners for said district are sufficient. *Schuler* v. *Hogan*, 168 Ill. 369; *People* v. *Cooper*, 139 id. 461; *People* v. *O'Hair*, 29 Ill. App. 242; *State* v. *Tolan*, 33 N. J. L. 195.

Where the time and place for an election are fixed by law, all persons interested are bound to take notice of an election so held. *Stephens* v. *People*, 89 Ill. 343; *Knox County* v. *Bank*, 147 U. S. 91; *Snowball* v. *People*, 147 Ill. 260; *Berrey* v. *McCullough*, 94 Ky. 247; *Commonwealth* v. *Smith*, 163 Mass. 411; Cooley's Const. Lim. (6th ed.) 759.

This plea sufficiently avers that the drainage commissioners took the oath required by statute. They were not required to take an oath to support the constitution of the United States or of this State. Starr & Cur. Stat. 1896, par. 120, p. 1542; *School Directors* v. *People*, 79 Ill. 511.

The *certiorari* proceedings pleaded by appellees to the first count of the information are a bar to any recovery on that count. The second replication to appellees' second plea to said first count is bad in not stating facts, but only inferences of fraud by the commissioners in making up the drainage record. *Beatty* v. *Nickerson*, 73 Ill. 605; *Roth* v. *Roth*, 104 id. 46; *Hopkins* v. *Woodward*, 75 id. 62.

The appellant having once selected a remedy to test the organization of this drainage district is concluded by the judgment therein pronounced. *Drainage District* v. *Griffin*, 134 Ill. 339; *Yourt* v. *Hopkins*, 24 id. 326; *Harms* v. *Stier*, 51 Ill. App. 234; *Conklin* v. *Cunningham*, 38 Pac. Rep. 170; *White* v. *White*, 34 Atl. Rep. 425.

Laches may be imputed to the People or to the relator in a *quo warranto* proceeding, when the object of the proceeding is to affect private or public rights or to subserve personal ends. *Chapman* v. *Drainage Comrs.* 28 Ill. App. 17; *People* v. *O'Hair*, 29 id. 239; *People* v. *Boyd*, 30 id. 608; 132 Ill. 60; *People* v. *Railroad Co.* 54 Ill. App. 348; *Catlett* v. *People*, 151 Ill. 25; *Drainage Comrs.* v. *Volke*, 163 id. 243.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—The first question, which arises in the case, is whether or not the court below erred in overruling the general and special demurrer, filed by the appellant to the plea filed by appellees to the second count of the information, the appellant having elected to stand by the demurrer so overruled. The plea to the second count of the information relates to the election and qualification of the appellees as drainage commissioners; and it is claimed that the plea fails to set forth specifically the various steps taken in the several elections of appellees, as required by the statute.

The first objection made to the plea is, that it neglects to set forth that the several elections of the above named appellees were held between the hours of two and six o'clock P. M. on the second Saturday in March. Section 15*a* of the act of June 27, 1885, in reference to Farm Drainage provides, among other things, that "it shall be the duty of the town clerk to call an election in each district in his township, including the new districts organized during the previous year, by giving ten (10) days' notice that an election will be held (specifying time and place); said notices shall be posted in three (3) conspicuous places in said districts. Elections shall be held in the several drainage districts, organized under this act, on the second Saturday in March of each year between the hours of two and six o'clock P. M." (2 Starr & Curt. Ann. Stat.—2d ed —p. 1542). It is true that elections must be held at the time and place provided in the statute. (*Stephens* v. *People ex rel.* 89 Ill. 337; *Snowball* v. *People ex rel.* 147 id. 260). But it is a well established rule that, where both the time and the place of an election are prescribed by law, every voter is supposed to take notice of the law, and to deposit his ballot at the time and place appointed, the right to hold the election in such case being derived from the law and not from the notice. (Cooley

on Const. Lim.—2d ed.—sec. 603; McCrary on Am. Law of Elections, sec. 118; *Stephens* v. *People ex rel. supra*). It is, however, stated in the plea that notices were given by the town clerk of the township of Milton, and were published by the posting of the same, as required by the statute, for more than ten days prior to the day for holding said election. The pleas name the day, upon which the election was to be held, and, as the law requires that the election should be held between the hours of two and six o'clock P. M., it will be presumed that the voters took notice of the particular hours of the day when the voting was to be done. It is said, however, that, as to one of the elections of one of the three appellees, the plea stated that the election was held on Saturday March 14, 1897, but that March 14, 1897, was Sunday, and that the court will take judicial notice of that fact. The giving of the date is manifestly a clerical error. The averment of the plea is, that these notices were posted for this election "for more than ten days prior to said 14th day of March, 1897, the day for holding said election." The day of the month mentioned may be excluded as surplusage, so that the averment would read "for more than ten days prior to the day for holding said election." As to the day for holding the election, the averment of the plea is sufficiently certain and not misleading.

The next objection, made to the plea, is that it states that the appellees, at the several elections mentioned in the plea, took the oath of office without stating specifically that the oath of office was taken, as required by the statute, before an officer authorized to administer oaths, and without further stating that an oath was taken by the appellees to support the constitutions of Illinois and of the United States. The plea alleged that the person elected "took the oath of office required by the statute." The form of the oath to be taken by the drainage commissioners is prescribed by section 15*a* of the Drainage act, as above set forth. This being so, it was not the in-

tent of the legislature to require any other or additional oath than the one so prescribed. (*School Directors* v. *People ex rel.* 79 Ill. 511). Involved in the allegation of the plea that the person elected "took the oath of office required by statute" is the statement that he took the oath prescribed by the statute before an officer authorized to administer the oath. It was not necessary to state all the details as to the mode and manner of taking the oath.

It is furthermore claimed by the appellant that section 15*a*, as above quoted, does not apply to the election of commissioners for union drainage districts. The point made is that sections from 11 to 47 of the act of June 27, 1885, relate wholly to districts in one town, and that section 48, entitled "Union Districts," relates to the districts in two towns, such as the one under consideration in the case at bar. (2 Starr & Curt. Ann. Stat.—2d ed.—p. 1556). It is said that in 1895 section 15*a* was added as an amendment to that part of the act which relates to one town, and does not purport to affect those portions of the act relating to drainage districts lying in two towns. A careful examination of section 48, in connection with the preceding sections of the act, will show that the election provided for in section 15*a* applies to drainage districts lying in two towns, as well as to those lying in one town. Section 48, which relates to union districts lying in two towns, provides that "the clerk and commissioners shall have like powers and duties, as provided for such officers in districts wholly in one town." (Ibid. p. 1557). Section 48 also provides that the commissioners when selected are to meet at the town clerk's office "as provided in section twelve (12) of this act, or to meet as provided in section sixteen (16), as the case may be." (Ibid.)

It is furthermore urged, as an objection to the plea by the appellants, that the appellees in the first instance should have set out every material fact relating to the organization of the so-called Union Drainage District No. 1, so that, from an inspection of the plea, the court

could see whether or not the statute had been complied with, and the district had in fact been legally formed. (*Clark* v. *People ex rel.* 15 Ill. 213; *Carrico* v. *People ex rel.* 123 id. 198). Inasmuch as the second count of the information is predicated upon the assumption, that the election of the appellees was invalid and without lawful authority, the one issue presented by the plea related to the election. There is no formal averment in this plea that the district was not legally organized, the organization of the district being merely matter of inducement, and therefore not traversable. (*Lamping Bros.* v. *Payne*, 83 Ill. 463).

So far as the second count of the information is concerned, we are inclined to think that the plea filed by the appellees was a good one, and that the demurrer thereto was properly overruled by the court.

Second—The second question, presented by the record, is whether the court below erred in sustaining the demurrers, filed by the appellees to the replications filed by the appellant to the pleas of the appellees to the first count of the information. The first count challenges the organization of the drainage district, and not, as does the second count, the validity of the election of the drainage commissioners.

The appellant demurred to each of the pleas filed by the appellees to the first count of the information, and, when the demurrers were overruled by the court, did not stand by the same, but replied to the pleas. By thus pleading over the appellant admitted the sufficiency of the pleas in law to bar a recovery under the first count. (*Peck* v. *Boggess*, 1 Scam. 281). But while this is so, the appellant had a right in the replications to make an issue of fact upon the allegations of the pleas, even though these allegations, if true, constituted a sufficient defense as a matter of law.

The first plea, filed by the appellees to the first count of the information alleged that on November 8, 1886, a

petition was addressed to the commissioners, and filed on the same day in the office of the town clerk of the town of Milton, which comprises the greater part of the lands described in the petition; that, in the petition, it was stated in substance that the signers thereto constituted the majority of the adult owners of lands lying in the district proposed to be organized, and the owners in the aggregate of more than one-third of the lands lying in said district. This plea also alleged that the three commissioners of highways, selected to act as drainage commissioners, met at the office of the town clerk of the town of Milton on November 10, 1886, in a preliminary meeting to organize such union drainage district; that, on motion, the said meeting was adjourned to said town clerk's office until Friday morning, November 19, 1886, at the hour of nine o'clock A. M.; that, on November 11, 1886, the town clerk gave notice of a meeting of said drainage commissioners at the town clerk's office in said town of Milton at the hour of nine o'clock A. M. on the 19th day of November, 1886, in pursuance of said adjourned meeting held on November 10, 1886; that the town clerk further gave notice November 11, 1886, by posting three written notices in three public places in and near to the said drainage district, that a meeting of the drainage commissioners would be held at the office of said town clerk on the 19th day of November, 1886, at nine o'clock A. M., for the purpose of organizing said drainage district, etc. The plea then avers that on the 19th day of November, 1886, the drainage commissioners met at the town clerk's office, and proceeded to ascertain and verify the facts and statements contained in the petition, and made a written statement of their findings, etc.; that they then and there, by public announcement, adjourned said meeting until the 27th day of November, 1886, at the hour of nine o'clock A. M. to be held upon the ground of the proposed ditch; that such facts so found by the commissioners were on the day of said meeting

put in writing and entered by the clerk in his record; that, on November 27, 1886, in pursuance of said last mentioned adjournment, the commissioners met on the land of the proposed ditch, with all the commissioners present, and went over and examined the lands described in the petition, and carefully examined the same, and employed a competent civil engineer to survey, estimate and make a plat of such proposed ditch and drainage district, and thereupon adjourned to the 10th day of December, 1886; that afterwards, in pursuance of said adjournment, on December 10, 1886, they met again at the clerk's office of said town, and approved the said plat, and completed the organization of said district, and entered an order to that effect, and declared the district fully organized; and thereafter, on December 27, 1886, met and agreed upon a graduated and classified scale for estimating the benefits, received by the owners of said lands by reason of said proposed drainage, and filed the same in the town clerk's office, and gave notice for a hearing thereof to be held in said office on January 4, 1887, etc.

The additional replication filed by the appellant to this plea denied, that the petition filed as aforesaid was signed by a majority of the adult owners of the lands embraced within such district, and that the signers thereof were owners of more than one-third of the land in the said proposed district. This replication also averred that no meeting was ever in fact held on November 27, 1886, pursuant to adjournment, as stated in the plea, and that the commissioners, in consequence of not having held a meeting pursuant to said adjournment, lost all jurisdiction over the organization and formation of said district. The replication further denied that the commissioners met on December 10, 1886, at the town clerk's office, and completed the organization of said alleged union district, and entered an order to that effect and declared the district fully organized.

It will thus be observed that the additional replication, filed by appellant to the first plea of appellees to the first count of the information, made an issue of fact whether the petition for the organization of the drainage district was signed by the number of persons required by the statute, and whether the adjourned meetings, required by the statute, were held in pursuance of the alleged adjournments. We are inclined to think that the replication was good, as thus tendering issues of fact, and that the court erred in sustaining a demurrer to the same. The allegations of the replication are admitted by the demurrer filed to it by the appellees. Section 11 of the Drainage act of 1885 provides for the signing and filing of the petition above referred to; and section 14 provides that, after providing for the holding of the preliminary meeting, the commissioners shall then adjourn their meeting to a time, not less than eight days nor more than fifteen days, and publicly announce the same; and section 15 provides that, at the time appointed for the adjourned meeting, the commissioners shall meet and enter on their record an order organizing said drainage district, and that such district shall thereupon be declared fully organized. (2 Starr & Curt. Ann. Stat.—2d ed.—pp. 1539-41). The organization of the drainage districts is a statutory proceeding, and every essential fact, necessary to the jurisdiction of the bodies organizing such districts, must appear affirmatively of record, as nothing will be intended or presumed to be within the jurisdiction. (*Payson* v. *People*, 175 Ill. 267). The petition of the land owners to form a drainage district is necessary and jurisdictional. (*People ex rel.* v. *Cooper*, 139 Ill. 461; *Carrico* v. *People ex rel.* 123 id. 198). When an adjourned meeting is required by law, the record must show that it was held. (*Comrs. of Highways* v. *Harper*, 38 Ill. 103; *Wood* v. *Comrs. of Highways*, 62 id. 391).

It is claimed by the appellees that the replication in question is bad because it seeks to impeach the record

set up in the plea. Such a replication would be bad in *certiorari* proceedings. The object of a writ of *certiorari* is to bring up the record of a proceeding from an inferior to a superior tribunal. The superior tribunal tries the case by the record alone as such record is returned in obedience to the writ, and not upon any issue of fact. The question to be determined is whether the inferior tribunal had jurisdiction, and whether it exceeded its jurisdiction. (*Whittaker* v. *Village of Venice*, 150 Ill. 195, and cases referred to). In a return to a writ of *certiorari* no facts *dehors* the record are certified, but simply the record itself. (*Comrs. of Highways* v. *Supervisors*, 27 Ill. 140). In *quo warranto*, however, the inquiry is much broader, and facts may be inquired into whether of record or not. Where the right in question depends upon facts, which can be established only by evidence *dehors* the record, the writ of *certiorari* is of no avail, but in such cases *quo warranto* is the proper remedy. (*Lees* v. *Drainage Comrs.* 125 Ill. 47; *Comrs. of Drainage District* v. *Griffin*, 134 id. 330; High on Ex. Legal Rem.—2d ed.—sec. 638; *People ex rel.* v. *Cooper*, 139 Ill. 461; *Drainage Comrs.* v. *Volke*, 163 id. 243; *People* v. *City of Peoria*, 166 id. 517). In *Drainage Comrs.* v. *Volke*, *supra*, it was said: "The judgment to be entered on the return to a common law writ of *certiorari* affects the validity of the record alone, and it must be determined from its face, solely, whether it is valid or invalid." But in this proceeding by information in the nature of *quo warranto*, the jurisdictional facts as to the signing of the petition, and as to the holding of adjourned meetings, can be inquired into. It follows that it was error in the trial court to sustain the demurrer to this replication.

Third—The next question is whether the demurrer, filed by the appellees to the replications filed by appellant to the second plea to the first count of the information, was properly sustained. This plea set up, as a bar to the *quo warranto* proceedings, certain *certiorari* pro-

ceedings formerly had in the name of the People on the relation of one John Bolwig.

In their second plea to the first count of the information the appellees allege that, on March 8, 1894, in the circuit court of DuPage county, the then drainage commissioners of said drainage district No. 1, etc., were impleaded in an action of *certiorari* at the suit of the People on the relation of John Bolwig, then an adult owner of lands embraced within the boundaries of said drainage district. The plea then sets up the proceedings in said action by *certiorari* in the circuit, Appellate and Supreme Courts. Those proceedings are set forth in full in *People ex rel.* v. *Drainage Comrs.* 165 Ill. 156, and need not be here rehearsed. The plea, after reciting such proceedings in *certiorari*, sets the same up as a bar to the present action. By the second additional replication to the plea last mentioned, appellant denies that the drainage record returned to the court in said *certiorari* proceedings was a true record of the proceedings, entered of record with reference to the alleged organization of said drainage district, and avers that the record presented to the court in the *certiorari* proceedings was a false record, and not a true one. The replication proceeds to aver that the petition for *certiorari* was filed in the circuit court of DuPage county on March 8, 1894, and that, thereafter on May 22, 1894, the attorneys, and the town clerk of the town of Milton, and certain alleged drainage commissioners of said alleged Union Drainage District No. 1 of Milton and Winfield townships, sought to fortify their said record by an untrue and false and fraudulent instrument in writing, containing untrue and false and fraudulent statements, resolutions and amendments to be added to and to take the place of parts of the true record in said drainage matter. Particularizing in reference to this matter, the plea averred that said commissioners on May 22, 1894, pretended to have adopted a resolution in words and figures as follows:

"*Resolved*, That there be added to the said record, under date of November 27, 1886, the following: At an adjourned meeting of the commissioners, duly held on the grounds of the proposed ditch on November 27, A. D. 1886, all the commissioners being present, the said commissioners personally went upon the lands in question included in the proposed district, and personally examined the same, and thereupon employed a competent civil engineer to make survey and estimates and a map and plat of his survey and of the proposed district. And thereupon the commissioners duly adjourned to meet at the clerk's office, December 10, A. D. 1886.

"*Resolved further*, That there be added to the said record, under date of December 10, 1886, the following: And thereupon the said petitioners and the said commissioners, still desiring the formation of the said drainage district as prayed in the original petition, and shown in detail in the said plat and map, approved and adopted as aforesaid, and no signatures being withdrawn, it was on motion ordered, that the said petition be granted and said drainage district, as shown in said plat and map, be organized, and the said district is hereby declared fully organized."

The plea then avers that said pretended resolution was not in accordance with the facts; that no such proceedings were ever had or entered of record, as were recited and attempted to be supplied by said pretended resolution; that the record of said pretended district, as it existed before said amendments were made thereto, was the true record of said district; and that thereafter the alleged commissioners made return in the *certiorari* proceedings by filing the pretended record of said alleged district so falsely amended; that it was said false record, which was involved in and passed upon in said *certiorari* proceedings; and that the same was so falsely and fraudulently prepared in order to procure a finding in the *certiorari* proceeding.

The judgment in the *certiorari* proceeding could not be pleaded as a bar in the present proceeding. As has already been stated, in a *certiorari* proceeding the writ brings up the transcript of an inferior tribunal for inspection, and the case is tried and determined upon the

record alone, no evidence outside of the record being admissible. The only thing to be determined in the *certiorari* proceeding is, whether the municipality or inferior tribunal has exceeded its jurisdiction. The common law writ of *certiorari* cannot be used to determine whether a certain corporation, such as a drainage district, has a legal existence. If the drainage district has not been legally incorporated, the statute furnishes a complete remedy by *quo warranto* whereby the question may be determined and settled in a direct proceeding. If a petitioner desires to call in question the validity of the organization of the district, he must proceed under the provision of the statute in reference to *quo warranto*. (*Lees* v. *Drainage Comrs. supra; Comrs. of Drainage District* v. *Griffin, supra*). Inasmuch as the *certiorari* proceeding only decides whether the municipality, assuming it to be legally organized, has exceeded its jurisdiction or not, the *certiorari* judgment cannot be pleaded as a bar in a *quo warranto* proceeding, where the question is as to the legal existence of the corporation or district. The questions in the two proceedings are not the same. The question, whether this drainage district was legally organized, was not determined, except incidentally, in the *certiorari* proceeding. In the latter proceeding, the question was whether the drainage district had the power to extend its boundaries, and not whether the district was originally organized in a legal way. The legality of the organization of a corporation or municipality, or of a drainage district, can be attacked judicially and examined only by direct proceeding by *quo warranto*. (*Osborn* v. *People ex rel.* 103 Ill. 224; *Blake* v. *People*, 109 id. 504; *Keigwin* v. *Drainage Comrs.* 115 id. 347; *Evans* v. *Lewis*, 121 id. 478; *Renwick* v. *Hall*, 84 id. 162). It is true that appellant demurred to the plea now under consideration, and, when the demurrer was overruled, failed to stand by it; and by thus pleading over the appellant has admitted the sufficiency of the plea in law, assuming the facts therein

set up to be true and the record therein mentioned to be a true and correct record. The judgment in the *certiorari* proceeding was based upon a record certified to the court as having been a true record. But the replication to the plea denies that the record was a true record, and claims that it was a false and pretended record, created and made nearly eight years after the facts recited in it occurred, and after the time when the record should have been made under the statute. The demurrer filed by the appellees to this replication admits the truth of the facts contained in it. In the *certiorari* proceeding the court accepted the record as made and presented to it, and could not inquire into the manner in which the record was created. In this proceeding by *quo warranto*, however, the issue of fact can be made whether or not the record was false and fraudulent, and that matter can be tried. Hence, we are of the opinion that the court below erred in sustaining the demurrer to this replication.

Fourth—A further plea was filed by the appellees to the first count of the information, setting up the lapse of time, and pleading *laches* and delay as against the appellant. The plea also avers that certain expenses were incurred in organizing, surveying, mapping, and constructing ditches, etc. After the demurrer filed to this plea by the appellant was overruled, appellant filed a replication thereto, denying the allegations of the plea, and making an issue of fact in relation thereto. The demurrer filed by the appellees to this replication, which is additional replication No. 3 to the third plea of appellees to the second count of the information, admits the truth of the facts set up in the replication.

In the first place, a drainage district of the character of the district here under consideration is a public corporation. (*Payson* v. *People*, 175 Ill. 267; *Elmore* v. *Drainage Comrs.* 135 id. 269). The Attorney General, or State's attorney, may file an information on behalf of the People where the interests of the public are involved at any

time; and lapse of time constitutes no bar to the proceeding in conformity with the maxim *nullum tempus occurrit regi.* Estoppel does not apply to a matter in the nature of a public right. The State is not embraced within the Statute of Limitations unless specially named, and by analogy does not fall within the doctrine of estoppel. Nor are municipal corporations within the operation of the Statute of Limitations as respects public rights. (*Catlett* v. *People ex rel.* 151 Ill. 16; *McPhail* v. *People*, 160 id. 77; *People* v. *Brown*, 67 id. 435). The replication avers that no money was ever expended in the territory, over which the appellees claim jurisdiction. Even, therefore, if the expenditure of such money could operate as an estoppel *in pais* as to such a public corporation as this drainage district, the question of the fact of such expenditure is put in issue by the replication. The doctrine of estoppel *in pais* has been sometimes applied to municipal corporations, but such cases are exceptional, and when they occur the public is only held to be estopped on account of special circumstances, which would make it highly inequitable or oppressive to enforce public rights. It is doubtful whether the plea now under consideration sets up any such special circumstances, but if it does allege their existence, the fact of their existence is denied by the replication. We are, therefore, of the opinion that the court below erred in sustaining the demurrer to the replication.

For the reasons above stated, the judgment of the court below, so far as it quashed the first count of the information and dismissed the *quo warranto* proceeding, was erroneous.

Accordingly, the judgment of the circuit court of DuPage county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

SAMUEL B. RAYMOND, County Treasurer, *et al.*

v.

THE HARTFORD FIRE INSURANCE COMPANY *et al.*

Opinion filed April 16, 1902.

1. INSURANCE—*two per cent tax on premiums received is a tax, and not a mere license fee.* The two per cent tax imposed by the act of 1899 (Laws of 1899, p. 265,) on foreign insurance companies other than life, is both a license fee for doing business in this State and a State tax having the effect of superseding the tax on net receipts provided for by the act of May 31, 1879, and all personal property taxes except as is otherwise provided by the terms of the act itself.

2. CONSTITUTIONAL LAW—*section 1 of article 9 of the constitution construed.* The second clause of the first section of article 9 of the constitution, providing that the legislature may tax certain occupations and interests in such manner as it shall from time to time direct by general law, is not confined to occupations only, but applies also to property interests which may be included in the method of taxation adopted by the legislature, which method may be different from that prescribed by the first clause.

3. SAME—*two per cent tax of foreign insurance companies is not a commutation of a State tax.* The two per cent tax on gross premiums received by foreign insurance companies, required by the act of 1899 to be paid to the insurance superintendent, is not a mere collection of some supposed equivalent for taxes legally due the State nor a commutation of State taxes, but is itself a State tax levied in a different manner than under the general Revenue law.

4. SAME—*sections 9 and 10 of article 9 of constitution considered.* Section 10 of article 9 of the constitution makes it incumbent on the legislature to require that all taxable property within the municipal corporations shall be taxed for the payment of their debts, such taxes to be uniform with respect to persons and property therein; and section 9 requires the same rule of uniformity to be observed in respect to corporate taxes.

5. SAME—*legislature cannot release property from municipal taxes.* Under sections 9 and 10 of article 9 of the constitution the legislature cannot exempt from municipal taxation any corporation or individual, or the property of such, within the municipality, nor can the legislature commute a municipal tax for a State tax.

6. SAME—*two per cent insurance tax act of 1899 is unconstitutional.* The act of 1899, (Laws of 1899, p. 265,) which levies a two per cent tax upon the gross amount of premiums received by foreign insurance companies other than life, is unconstitutional, in that its effect is to release such corporations from the payment of local taxes except as to real estate.

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

The only question presented by this record is the construction and constitutionality of the act entitled "An act providing for a tax on gross premium receipts of insurance companies and associations other than life," approved April 19, 1899, in force July 1, 1899, (Hurd's Stat. 1899, p. 1042,) which is as follows:

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every insurance company or association, other than life, organized or incorporated under the laws of any other State or nation, and every other insurance company, other than life, whose charter may be owned, or a majority of whose stock may be controlled, or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any other State or nation, shall at the time of making the annual statements as required by law, pay to the insurance superintendent as taxes, two per cent of the gross amount of premiums received by it for business done in this State, including all insurance upon property situated in this State, during the preceding calendar year. The payment of said taxes shall be a condition precedent to the privilege of doing business in this State. Upon compliance with the laws of this State and the payment of said taxes, the insurance superintendent shall issue the annual certificate as provided by law, and the taxes provided in this act shall be in full for all taxes, State and local, against such corporations or associations, except taxes on real estate, and such reciprocal tax as is required by law: *Provided*, where fire insurance companies pay into cities and villages, that have an organized fire department, a tax of two dollars or less, on every $100 of premiums received by the company, in such city or village, said amount shall be deducted from the amount

to be paid to the insurance superintendent by provisions of this act."

The appellees, the Hartford Fire Insurance Company and the Home Insurance Company of New York, filed their bill in the circuit court of Cook county to restrain the appellants, Henry H. Fuller, collector of the town of South Chicago, and Samuel B. Raymond, treasurer and *ex officio* collector of Cook county, from collecting or attempting to collect a tax levied by the taxing authorities of the town of South Chicago on the personal property of the appellee companies in the city of Chicago. The bill sets out compliance with all the State laws prescribing the terms upon which foreign insurance companies may transact business in this State, due license from the State and payment of the tax required in the above act of 1899, the Hartford company paying $7050.47 and the Home company $3881.92 as such tax. The bill further sets out that the sum of $73.66 is unlawfully assessed against the Hartford company on its personal property in the city of Chicago, to-wit, office furniture, safe, printing press and supplies, for State, county, city, school, library, drainage and South Park taxes, on a valuation of $5000 and an equalized assessment of $880; and likewise the sum of $7.39 against the Home company on its personal property of a similar character, valued at $500 and assessed at $88. A demurrer to the bill was overruled, and the appellants, abiding by their demurrer, have appealed to this court from the decree enjoining the collection of the tax.

EDWIN W. SIMS, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for appellants:

The act of 1899, read in connection with the provisions of the constitution and the general law, means that complainants, as foreign corporations, are required to pay the sum specified to the State for the license or special privilege conferred upon them by the State to carry

on a general insurance business in the State, and should not be construed to mean that they are thereby exempted or relieved from the payment of general taxes levied upon an assessment by valuation. Const. art. 9, sec. 1, clause 2; Hurd's Stat. 1899, chap. 73, sec. 30; *Home Ins. Co.* v. *Swigert*, 104 Ill. 653; *Walker* v. *Springfield*, 94 id. 364; *People* v. *Thurber*, 13 id. 554; *Hughes* v. *Cairo*, 92 id. 339.

The act of 1899, in so far as it purports and to the extent that it seeks to exempt complainants' property from the payment of general taxes levied upon an assessment by valuation, is unconstitutional and void, being in conflict with section 1 of article 9 of the constitution, in respect to the provisions therein enjoined, that taxes shall be levied by valuation, by the persons and in the manner prescribed by general law. Const. art. 9, sec. 1; *Homestead Ass.* v. *Keith*, 153 Ill. 609; *Crane* v. *West Chicago Park Comrs.* id. 348.

The act of 1899, in so far as it exempts complainants' property from the payment of general taxes to the city of Chicago, county of Cook, etc., levied for the payment of the indebtedness of such municipal corporations, is in direct conflict with the constitution, and is therefore to that extent unconstitutional and void. *High School District* v. *Lancaster County*, 60 Neb. 147; Const. art. 9, sec. 10; *St. Louis Bridge Co.* v. *East St. Louis*, 121 Ill. 238.

CARY & WALKER, and BARGER & HICKS, for appellees:

The act of July 1, 1899, selects, for the purpose of taxation, a recognized class of corporations, and levies a uniform, specific property tax peculiar to that class, based on gross earnings. It further provides that such taxes shall be in full of all taxes except taxes on real estate and reciprocal taxes. By virtue of the appropriation of such tax levy to State purposes such act commutes all other taxes of such class for county, town and municipal purposes, except taxes on real estate and reciprocal taxes. Cooley on Taxation, (2d ed.) 592, 595, 572.

Under the authority granted by sections 1 and 2 of article 9 of the constitution of 1870, the legislature may, by general law, levy a specific form of property tax upon any recognized class of individuals or corporations, if uniform as to such class; and it may also provide that such tax shall be in lieu of all other forms of taxation that might otherwise be charged to such class. *Porter* v. *Railroad Co.* 76 Ill. 561; *Hughes* v. *Cairo*, 92 id. 339; *Sterling Gas Co.* v. *Higby*, 134 id. 557; *Coal Run Coal Co.* v. *Finlen*, 124 id. 666; *Insurance Co.* v. *Swigert*, 104 id. 653; *Homestead Ass.* v. *Keith*, 153 id. 609.

The right of the State to appropriate for State purposes a specific tax, levied uniformly throughout the State, to the exclusion of any interest of the public or municipal corporation therein, is not prohibited by sections 3, 6, 9 and 10 of article 9 of the constitution. These sections are to be interpreted in the light of the following principles:

It is a fundamental principle of taxation that the legislature holds exclusively the sovereign power, except as limited by constitutional provision, of levying, collecting and distributing all taxes. The public or municipal corporation acquires its right to tax only by delegated authority. Cooley on Taxation, (2d ed.) 61, 142, 329.

Between the legislature and its creature, the public or municipal corporation, there can be no reciprocity of stipulation. Therefore, any power to tax delegated to a municipal corporation by the legislature may be re-called at pleasure. *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514; *Meriwether* v. *Garrett*, 102 id. 472.

The legislature may appropriate for State purposes a specific tax levied upon a designated class, and commute to such class a further payment of local taxes. *Railroad Co.* v. *McLean County*, 17 Ill. 290; *Neustadt* v. *Railroad Co.* 31 id. 484; *Hunsaker* v. *Wright*, 30 id. 146; *Chicago* v. *Sheldon*, 9 Wall. 50; *Supervisors* v. *Campbell*, 42 Ill. 490; *Wetherell* v. *People*, 116 id. 631; *Railway Co.* v. *Chicago*, 178

id. 339; *New Orleans* v. *Houston*, 119 U. S. 265; *Parmelee* v. *Chicago*, 60 Ill. 267.

The public corporation, in levying and collecting taxes, acts as the agent of the State, and is vested with no property interest in such taxes. *People* v. *Power*, 25 Ill. 169; *Supervisors* v. *Springfield*, 63 id. 66; *Logan County* v. *Lincoln*, 81 id. 156; *Wetherell* v. *Devine*, 116 id. 631; *Harris* v. *Supervisors*, 105 id. 445.

Mr. JUSTICE CARTER delivered the opinion of the court:

The grounds upon which appellants base their argument for a reversal of the decree in this case are, first, that by a proper construction of the act of 1899, set out in the statement of the case, the tax of two per cent therein required to be paid to the State superintendent of insurance is to be regarded only as a license fee to be paid as a condition precedent to the exercise by foreign insurance companies of the privilege of doing business in this State, and is not intended to relieve the company of the burden imposed upon all alike,—that is, the payment of general property taxes; and second, if it cannot be so construed then the act is unconstitutional.

It is sufficient to say, that the plain language of the statute itself is in direct conflict with the first view presented. It provides that "the taxes provided in this act shall be in full for all taxes, State and local, against such corporations or associations, except taxes on real estate, and such reciprocal tax as is required by law." It seems clear that the purpose of the act is to require such corporations to pay the two per cent on their gross receipts *as taxes*. Indeed, it expressly so provides; and when paid they are to be in lieu of all other taxes whatsoever, except as therein mentioned. The two per cent is both a license fee for doing business in this State and a State tax, and evidently has the effect, if the act is constitutional, of superseding the tax on net receipts provided for by the act of May 31, 1879, (Hurd's Stat. 1899,

p. 996,) and all personal property taxes, except as otherwise provided in the act itself, notwithstanding the later act does not contain any repealing clause.

The second question then arises,—is the act of 1899 in conflict with the constitution? The appellants insist that it violates each of the following sections of article 9 of the constitution of 1870:

"Sec. 1. The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property —such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

"Sec. 3. The property of the State, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law." * * *

"Sec. 6. The General Assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever."

"Sec. 9. The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same.

"Sec. 10. The General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." * * *

The contention that the statute violates the first section above set out is, that the second clause of that section does not relate to property taxes strictly so called, but to taxes which the legislature may authorize to be levied on different kinds of business or occupations, and that such taxes were intended by the framers of the constitution to be in addition to, and not in lieu of, the tax on property by valuation provided for in the first clause, and that although the legislature has the power to impose the tax authorized by the act of 1899 on foreign insurance corporations as a class, for the privilege of doing business in this State, it has no power to relieve them of their personal property tax imposed by the general Revenue law, enacted under the first clause. There is no substantial difference between this section of the present constitution and section 2 of article 9 of the constitution of 1848, and this court has held that said second clause is not confined to occupations, but applies also to property interests, which may be included in the method of taxation adopted by the legislature, and which method

may be different from that prescribed by the first clause of said section 1. *Illinois Central Railroad Co.* v. *McLean County*, 17 Ill. 291; *Sterling Gas Co.* v. *Higby*, 134 id. 557; *Coal Run Coal Co.* v. *Finlen*, 124 id. 666; *Porter* v. *Rockford, Rock Island and St. Louis Railroad Co.* 76 id. 561.

While the legislature may, under the second clause of section 1 and under the second section, adopt a different manner of taxing the subjects or objects of taxation therein provided for, it is a constitutional requirement that it shall be done by general law and so as to be uniform as to the class upon which it operates. The fundamental principles of the constitution governing the exercise by the legislature of the power of taxation appear to be uniformity and equality in the distribution of the burdens of taxation, without taking from the law-making power the discretion to classify and tax occupations, franchises, privileges and business and property interests of certain kinds in a different manner from the manner prescribed for the taxation of property generally, but still requiring the rule of uniformity to be observed as to the class taxed,—that is, as to the constituents of each such class. It is not denied that all members of the class taxed under the statute of 1899 are taxed by a uniform rule, and, therefore, unless sections 1 and 2 are modified by other provisions of the constitution or the statute is in conflict with some other provision, we are of the opinion it cannot be pronounced invalid. But it is the duty of courts to consider all of the provisions of the constitution bearing upon the question at issue, and to so construe them as to give effect to each and all of them. It will be seen from section 2 that it was not intended to limit the power of the legislature to the subjects or objects of taxation enumerated in section 1, but that the power is expressly reserved to that body to tax other subjects or objects "in such manner as may be consistent with the principles of taxation fixed in this constitution." Section 3 limits the power of the legis-

lature to exempt from taxation a certain class or certain classes of property, and it is not, of course, contended that the property of foreign insurance companies falls within such class or classes; and if the property in question which is relieved from local taxes by the statute is thereby exempted from such local taxes within the meaning of the constitution, such statute would be in conflict with said section 3, and void for that reason.

Again, section 6 takes from the legislature the power which it would otherwise have to release or discharge public and municipal corporations therein mentioned, or their inhabitants, or the property within their limits, from their or its proportionate share of *State* taxes, or to authorize commutation for State taxes in any form whatsoever. It will be observed that this section refers to taxes for State purposes only. Then, again, section 9 enforces the rule of uniformity in the levy and collection of municipal taxes throughout the jurisdiction of every municipal corporation, for all corporate purposes, except for local improvements. And section 10 denies to the General Assembly the power to impose taxes for corporate purposes on municipal corporations, or on their inhabitants, or the property therein, but provides that it "*shall require* that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same."

In *People* v. *Barger*, 62 Ill. 452, the inhabitants of Shawneetown were exempted by its charter from all State taxes for twenty years, and a sum equal in amount to what the State taxes would produce was required to be levied and collected from the property within the city for the purpose of building a levee to protect the city from overflow, and it was held that the State received nothing for its taxes, and that the inhabitants did not pay a State tax in proportion to the value of their prop-

erty, and the statute was not sustained. The case was distinguished from *People* v. *Miner*, 46 Ill. 384, which authorized a diversion of State taxes after they were collected, while in the *Barger case* the statute released the inhabitants from payment.

In *People* v. *Lippincott*, 65 Ill. 548, the taxes on certain real estate in Randolph county were by a special act of the legislature appropriated and applied for the benefit of the Kaskaskia River Navigation Company for the purpose of making a local improvement, and it was said that the real estate owners really paid no State taxes, but instead thereof paid the amounts of such taxes towards the making of the local improvement. "As the act directs the collector of Randolph county to pay over the State taxes named, as soon as collected, to the treasurer of the Kaskaskia River Navigation Company, to be applied to the improvement of said river, we look upon it as but a form of commuting such State taxes for the payment and appropriation of a sum of money of equivalent amount with such State taxes to this local improvement. * * * To give effect, then, to this act of the General Assembly would, as we conceive, amount to an authorization of the commutation for State taxes allowed by the act, and therein be repugnant to the provision of the constitution above cited, which declares that commutation for taxes, to be levied for State purposes, shall not be authorized in any form whatsoever." The act was declared inoperative by the adoption of the constitution of 1870.

Ramsey v. *Hoeger*, 76 Ill. 432, turned upon the provisions of the act of April 16, 1869, in relation to the railroad debts of municipalities, and it was said that the necessary effect of the act was to exempt tax-payers in the counties, townships, cities and towns availing of its provisions, from the payment of so much of the State tax as is appropriated to the particular counties, townships, cities or towns, and the State received no consideration for the exemption granted by the act. The act was held

abrogated by the constitution of 1870, and the question was held to be substantially the same as in *People* v. *Lippincott*, *supra*.

We do not mean to say that the last clause of section 6, forbidding commutations of State taxes in any form, has no broader significance than the first clause forbidding the release or discharge of any district of the State, or its inhabitants or property, from its or their proportionate share of State taxes, but only that that was deemed a form of commutation and a prevalent evil chiefly intended to be guarded against. (See Debates Const. Conv. 1198.) We are of the opinion, however, that a construction of this section would not be authorized which would permit commutations of State taxes in some other form than the one most prevalent when the constitution was adopted. The power to commute State taxes existed under the constitution of 1848, (*Illinois Central Railroad Co.* v. *McLean County*, 17 Ill. 291,) but that instrument did not contain the express prohibition embodied in the constitution of 1870. This clause forbids commutations of State taxes in any form whatsoever, and it should not be shorn of its meaning and beneficial operation by judicial construction. It was the substance, and not the mere form, of the evil which was intended to be guarded against. But releases and commutations of State taxes, only, are expressly forbidden,—not local taxes. (*Wetherell* v. *Devine*, 116 Ill. 631.) And unless the act of 1899 releases or discharges foreign insurance companies from State taxes or commutes such taxes in some form, it is not obnoxious to this constitutional provision, however it may affect local taxes. Now, if the General Assembly had the power, as we have hereinbefore shown it had, under said second clause of section 1 of the constitution, to tax foreign insurance companies by a different method or plan than is prescribed in the first clause of that section, the adoption of such method or plan would not amount to a commutation of State taxes simply because of such dif-

ference of method or plan. To so conclude would be to conclude that the constitution authorized in one section what it forbids in another. We are of the opinion that if there was in the case at bar any commutation it was of local and not of State taxes, and that the two per cent paid to the insurance superintendent was paid as State taxes levied under the second clause of said section 1, and is not a mere collection or acceptance of some supposed equivalent for taxes legally due the State, and is not a commutation of State taxes at all, but is itself a State tax levied in a different manner than by the general Revenue law.

The question arises, has the legislature the power to commute the local taxes levied on appellees' personal property, without any equivalent tax, or to release appellees from payment of their local taxes upon payment of the State tax of two per cent on their gross receipts? As we have seen, such power is not inhibited by section 6, which applies only to State taxes. But it must not be forgotten that section 10 makes it incumbent on the legislature to require that all taxable property within municipal corporations shall be taxed for the payment of their debts, such taxes to be uniform in respect to persons and property therein; and section 9 requires the same rule of uniformity to be observed in respect to corporate taxes. The local taxes here sought to be enjoined were municipal taxes and in part levied to pay municipal debts, and if the act in question be sustained the rule of uniformity enjoined by the constitution would be destroyed and a portion of the property in the corporate limits would no longer be subject to taxation to pay the corporate debts. Surely, if the legislature must, by constitutional mandate, require that all taxable property within the municipal limits shall be taxed to pay municipal debts, and that such taxes shall be uniform in respect to persons and property within the jurisdiction of the municipality, it cannot exempt or release any corporation or individual, or its property

within its limits, from such tax or commute such tax for a State tax. If it can, then by changing its mode of taxation, and by taxing "brokers, merchants, commission merchants, inn-keepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance. telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges," a large portion of the taxes levied to pay the debts of cities and villages would be rendered illegal and uncollectible and this requirement imposed upon the General Assembly by section 10 would become nugatory. While the act in question does not apply to real estate, but expressly excepts it, thus leaving it to be taxed under other laws, yet if the statute be not limited to personal property used in the business taxed, all personal property in the municipality owned by persons or corporations included in the statute would be relieved of all municipal taxes. While, doubtless, it may be safely said that the General Assembly would never enact laws so unequal in operation and of such a mischievous tendency, still such laws would, if enacted, differ in scope and degree only from the statute now under consideration, and not in character. But the question is one of constitutional power, and if such power is denied altogether by some provision of the constitution it cannot be exercised to any extent.

We do not regard the case of *Illinois Central Railroad Co.* v. *McLean County*, 17 Ill. 291, as in conflict with this. As above said, the express prohibition against commutation of State taxes was not contained in the constitution of 1848, and so far as it was held that the property of the Illinois Central Railroad Company was exempted from taxation for county purposes the question was different from the one here presented. The question here relates to municipalities like cities and villages, and not to counties. In *Wetherell* v. *Devine*, 116 Ill. 631, we held that the power of the legislature over the revenues of a county is not restricted within the same limits as is its power

over the revenues of a city, town or village. "A county is a public corporation, which exists only for public purposes connected with the administration of the State government, and it and its revenues are alike, where no express constitutional restriction is found to the contrary, subject to legislative control." It is seen that section 10 of article 9 has no reference to counties, as did the McLean county case, but is confined to municipal corporations proper; and it may be observed that the results of that case, and the rights of the State and of the railroad company, seem to have been made secure by a separate and special section of the present constitution.

Counsel for appellees cite and quote from many cases which announce the familiar doctrine that municipal corporations are mere creatures of the statutes, which have entire control over them unless limited by the constitution. That doctrine is not controverted, but it cannot be contended, in face of the constitutional provisions referred to and others, that they do not limit the powers of the legislature in such control in many respects. It is easy to see that if legislation of this character be sustained and should continue to be enacted, all uniformity in taxation, especially as affecting municipal corporations, their inhabitants and the property within their limits, and the security of creditors in their reliance upon its revenues derived from taxation of all such taxable property, would be destroyed. It would probably be conceded that if the legislature had passed an act simply exempting the personal property of foreign insurance companies from all local taxation such act would have been void. In *People's Loan Ass.* v. *Keith*, 153 Ill. 609, it was held that such an act was void which exempted the stock and notes of a homestead association from taxation, and the sections of the constitution above set out were referred to. The legislature had the undoubted power to tax these companies on their gross or net receipts, and if it were conceded that it had the power to

commute the local taxes, such power would have to be exercised consistently with the principles fixed by the constitution. In *Cooper* v. *Ash*, 76 Ill. 11, it was said: "Even if it were conceded, which it is not, that the legislature may commute county or local taxes for some other consideration in lieu thereof, such commutation should operate with fairness and uniformity upon the tax-payers of the corporation with which it should be made." (See, also, *Hayward* v. *People*, 145 Ill. 55.) The former act (Hurd's Stat. 1899, p. 996,) provided for the taxation of the net receipts of such companies for all purposes, State, county, town and municipal, and was not subject to the vice which we consider fatal to the act of 1899.

After resolving all doubts in favor of the validity of the statute, we are unable to reconcile it with the provisions of the constitution, and must therefore hold the act in question unconstitutional and void. The act being void, no other law applicable to the taxation of appellees' property or receipts is by it repealed or affected in any way.

The decree will be reversed and the cause remanded, with directions to dismiss the bill.

Reversed and remanded.

THE ILLINOIS STEEL COMPANY

v.

JOHN MCFADDEN, Admr.

Opinion filed April 16, 1902.

1. MASTER AND SERVANT—*servant has right to assume that master will not expose him to unreasonable risk.* The master must exercise care and prudence that those in his employ be not exposed to unreasonable dangers, and the servant has a right to assume that the master will exercise that diligence to protect him from injury.

2. SAME—*right of a servant to obey master's commands.* A servant ordered by the master to do a dangerous act is not required to balance the degree of danger with absolute certainty, and the fact

that he had knowledge of the danger will not defeat recovery for injury, if, in obeying his master's command, he acted with the degree of prudence which an ordinarily prudent man would have used under the same circumstances.

3. SAME—*degree of care to be used does not rest wholly in the master's judgment.* An instruction in a personal injury case is erroneous which relieves the defendant from liability in case the defendant's superintendent exercised such care as in his judgment it was necessary to use at such time.

4. TRIAL—*what evidence sufficient to warrant submission of case to the jury.* Evidence that plaintiff's intestate was employed to remove a "bosh-plate" from the wall of a furnace; that it was customary to turn off the blast before the plate was removed; that defendant's superintendent ordered the plate removed before the blast was turned off, which resulted in the plate being blown out and plaintiff's intestate being killed by fire and molten metal, is sufficient to justify the submission of the case to the jury.

Illinois Steel Co. v. *McFadden*, 98 Ill. App. 296, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

The Appellate Court makes the following statement of facts in this case:

"This was an action on the case, brought by appellee against the Illinois Steel Company, charging the latter with negligently causing the death of appellee's intestate, Harry Walsh, on May 22, 1899. The first count of the declaration charged that the defendant ordered said Harry Walsh to go upon a certain platform at a blast furnace in one of its buildings, and loosen a certain bronze plate or casting, commonly callen a 'bosh plate,' set in the wall of said furnace; that the said Walsh and other agents and servants of appellant, in obedience to said order, went upon the said platform, and were engaged in loosening said plate at a time when there was a blast in said furnace, which caused a great amount of pressure upon the walls of the furnace and upon the bosh plate; that it was the duty of the defendant to remove the pres-

sure from said furnace, caused by said blast, so that said bosh plate would not, by said pressure, be forced out of the wall of the furnace; that appellant carelessly and negligently failed and neglected to cause the pressure on said furnace and bosh plate, caused by said blast, to be removed; that said blast forced said bosh plate from the wall of the furnace and permitted the flame and fire to escape, inflicting injuries upon said Walsh, from which he afterwards died. The second count was the same as the first, except that the injuries are alleged to have been caused by the negligence of Patrick Conlon, an employe of appellant, who was superintendent of the blast furnace. The general issue was pleaded and there was a verdict and judgment in favor of appellee for $5000. * * *

"Walsh was employed in the steel mills of appellant at Joliet, as a pipe-fitter and worked under the direction of Conlon, an assistant superintendent of appellant, who had charge of all the men about the furnace room, where deceased was employed. It was one of the duties of deceased to assist in removing bosh plates from the furnace, when necessary. A bosh plate is a hollow metal casting, inserted in the walls of a blast furnace, constructed so that a stream of water may be kept running through it, designed to keep the wall of the furnace cool. When a plate becomes injured so that it leaks, it must be removed and a new plate inserted. The plate in question was about twenty-two inches wide, twenty-eight inches long, and about two and one-half inches thick on the side that was exposed to the heat of the furnace, and about five inches thick on the outside. Such a plate weighs from 280 to 307 pounds. When it is necessary to remove a bosh plate, a bar of iron, which in this case was about thirteen feet long, is inserted into an ear on the plate made for the purpose. At the end of the bar farthest from the furnace a pin is inserted, projecting through the bar. A heavy ball, which slides upon the bar, is thrown forcibly against the pin, and the bosh plate

thus loosened. It was the custom to first loosen the bosh plate, so that it could be taken out quickly, but to defer the final removal until a time when the casting of metal was being run out of the furnace. These castings were taken off about every three hours. When the casting is being taken off, the blast upon the furnace is gradually lowered under the direction of the superintendent, or his assistant, until its entire removal, at which time the outlet, from which the melted iron flows, is stopped with a large lump of clay and the blast immediately turned on again with full force. It was the custom to remove the defective bosh plate, and insert the new one, while the blast was off."

An appeal was taken from the judgment of the circuit court to the Appellate Court. The judgment of the circuit court has been affirmed, and the present appeal is from such judgment of affirmance.

GARNSEY & KNOX, (WILLIAM DUFF HAYNIE, of counsel,) for appellant.

J. W. DOWNEY, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—At the close of the plaintiff's evidence, the appellant moved to exclude all his evidence from the jury. This was denied; and a written instruction to find for the defendant was tendered and refused, and due exception was taken. At the close of all the proof, defendant tendered an instruction in writing instructing the jury to find for the defendant. The court refused it, and defendant took an exception.

"The law is well settled that where there is evidence tending to establish a cause of action, it is not error to refuse a peremptory instruction to find for the defendant." (*Graver Tank Works* v. *O'Donnell*, 191 Ill. 236). The evidence

tends to show, that it was the invariable custom to remove the defective bosh plate when the blast was entirely taken from the furnace. This seems to have been necessary as a measure of safety, inasmuch as it would not be possible to remove an old bosh plate, and replace it with a new one, while the furnace was in operation. The evidence also tends to show that, when a bosh plate became defective or burned out so that it required re-placing, the old bosh plate was first loosened in the wall of the furnace by the operation of a draw-bar made for that purpose, and, after it had been sufficiently loosened, the men always waited until the casting was drawn off and the blast was removed from the furnace, and then the old plate would be removed, and the new one would be put in place while the blast was off.

The negligence charged is, that the appellant ordered the deceased and other servants to work at the plate while the blast was on. In other words, it is claimed by the appellee that Conlon, the superintendent of the appellant, ordered Walsh, and the men with him, to remove the bosh plate without directing the blast to be entirely stopped, and that, consequently, the plate was expelled by the force of the blast, and the expulsion, being attended by an escape of fire and flame, caused the injury to Walsh which resulted in his death.

The evidence tends to show that Conlon, the superintendent, took charge of the work in hand on the day when the accident occurred, and gave all the orders with reference to the manner in which the work should be done. When the plate was first loosened, he ordered all the men to come down from the platform and wait until the casting was done. The evidence tends, furthermore, to show that, before the casting was completed, the superintendent ordered Walsh, and the other men, to go back upon the platform, and to strike the first and second blows on the draw-bar before the casting was completed. The deceased had a right to expect, while he

was obeying the order of his superior, that he would not unnecessarily expose him to danger. (*Offutt* v. *Columbian Exposition*, 175 Ill. 472). It would appear, that Conlon ordered these men to proceed with the work at a time when he must have known that the casting was not drawn, or the blast removed from the furnace. As he was superintendent or vice-principal, his determination to do the work in a dangerous manner was the determination of the master, and the master in such case is liable for the negligent acts of the vice-principal. (*Metropolitan Elevated Railroad Co.* v. *Skola*, 183 Ill. 454). A servant, ordered by one in authority to do a dangerous act, is not required to balance the degree of danger and decide with absolute certainty whether he may safely do the act, and, even if he had knowledge of such danger, it would not defeat a recovery for injury, if, in obeying his master's command, he acted with that degree of prudence, which an ordinarily prudent man would have used under the same circumstances. (*Chicago Edison Co.* v. *Moren*, 185 Ill. 571; *Swift & Co.* v. *O'Neill*, 187 id. 337; *City of LaSalle* v. *Kostka*, 190 id. 130; *Graver Tank Works* v. *O'Donnell*, *supra*).

There being evidence tending to establish the fact, that the appellee was in the exercise of ordinary care for his own safety, and that the appellant was negligent in ordering him to work at the plate while the blast was on, it was not error for the court to refuse to take the case from the jury.

Second—It is urged on the part of the appellant, that the trial court erred in refusing to give the fifteenth and eighteenth instructions asked by the appellant. Instruction numbered 15, so refused, is as follows:

"If the jury shall believe from the evidence that Walsh was apprised or notified by the blowing out of the nipple on the side of the bosh plate that he and his helper, Rogena, were at work at, that it would or might be dangerous to proceed with the work, it was his duty to notify the men, who had charge of the weight on the bar,

to stop striking, and, if he failed to do so, but allowed them to continue the work, then said Walsh failed to exercise that degree of care for his own safety which the law required, and you will find for the defendant."

This instruction was properly refused for the reason that it assumes that the nipple upon the bosh plate, with which the water pipes were connected, blew out. So far as we have been able to ascertain, there is no evidence in the record that while the work upon the plate was in operation a nipple blew out from the bosh plate. The instruction puts upon Walsh the duty of notifying the men to stop striking on the bar, when the proof tends to show that Conlon, the superintendent, was there present ordering the blows to be struck. The position of Walsh was one of obedience, and not of command and supervision. It was his duty to obey, and he did obey the orders given to him by the superintendent. The servant does not assume the risk of the master's own negligence. The master is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks or dangers; and a servant has a right to understand that the master will exercise that diligence in protecting him from injury. (*City of LaSalle* v. *Kostka*, *supra; Illinois Steel Co.* v. *Schymanowski*, 162 Ill. 447). But, at least three instructions, to-wit, instructions numbered 11, 14 and 16, were given for the appellant at its request, which cured the error in the refusal of instruction numbered 15, if there was any error in such refusal. Without deciding whether or not instructions numbered 11, 14 and 16, as given for the appellant, laid down the law correctly, it is sufficient to say that, by their terms, the jury were told that, if Walsh was apprised of danger by the blowing out of the nipple, or the escaping of gas, it was his duty to cease work on the building.

Instruction numbered 18, asked by the appellant and refused, is as follows:

"You are instructed that the steel company, defendant herein, is not to be held liable for any case of accident, nor is it to be held liable to any person who may be injured, or to his widow or next of kin in case of death, except in case be proven by a preponderance of the evidence, that some act or acts of negligence on the part of the steel company or its officers or agents, and you are further instructed that, if, from the evidence, you shall believe Patrick Conlon was the assistant superintendent of the Illinois Steel Company, and, as such assistant superintendent, was in charge of, and superintending the removal of, this bosh plate, which caused the injury, and if from the evidence you further believe that the said Conlon was exercising all of the care which, in his judgment, as such superintendent, was necessary to be exercised at that time, and that, notwithstanding such exercise of care by him, said Conlon, the plate was forced out whereby the decedent, Harry Walsh, lost his life, you will find for the defendant."

This instruction is defective because the second part of the first clause thereof is meaningless, inasmuch as the words, "some act or acts of negligence on the part of the steel company or its officers or agents," have no verb which they qualify. In other words, there is a nominative case without any verb following it. But the instruction is defective for the further reason that it assumes that Conlon, the superintendent, was only to exercise such care, as, in his judgment as superintendent, it was necessary to exercise at that time. Inasmuch as the custom and practice had always been to draw the casting and take off the blast before the plate was removed, it was the duty of the superintendent not to order the deceased and the other servants to work at the plate while the blast was on; and it was not sufficient to say that he had a right to exercise his own judgment in determining whether it was safe for the men to work at the plate while the blast was on. If the statement of the super-

intendent himself, that he exercised all the care which in his judgment was necessary, is sufficient, then a convenient defense could always be made in all cases of negligence, where it could not be proven that the vice-principal, or foreman, was incompetent or habitually careless.

The first part of the instruction states that the appellant was not to be held liable "for any case of accident." The rule is, that the servant has a right to understand that the master will exercise such care and prudence, as is necessary to prevent the servant from being exposed to unreasonable risks or dangers; and "it is only such injuries, as have arisen after the exercise of that diligence and care on the part of the master, that can properly be termed accidents or casualties which the servant has impliedly agreed to risk, and for which the master is not liable." The vice of the instruction is, that it relieves appellant from liability in the case of accident without the qualification, that there has been the previous exercise of such care and diligence on the part of the master as is above specified. The servant does not agree to take the risk of every accident or casualty without reference to the previous exercise of diligence and care on the part of the master to avoid such accident or casualty. (*City of LaSalle* v. *Kostka*, *supra*; *Noyes* v. *Smith & Lee*, 28 Vt. 64).

Some eighteen instructions were given in behalf of the appellant, presenting the case to the jury in almost every possible phase suggested by the evidence; and the appellant has no reason to complain that the jury was not fully and properly instructed upon all the propositions of law involved in the case.

For the reasons above stated, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

JOHN KOELLING *et al.* v. PEOPLE *ex rel.* Raymond,
and
THE TITLE GUARANTEE AND TRUST COMPANY v. SAME,
and
THE CHICAGO AUDITORIUM ASSOCIATION v. SAME.

Opinion filed April 16, 1902.

1. TAXES—*plats not conforming to the statute do not have legal effect of statutory plats.* Plats not made in compliance with the statute authorizing them do not have the legal effect of statutory plats, so as to make the descriptions set forth therein good and valid descriptions of the property.

2. SAME—*when description of property for taxation is sufficient.* Although the description of property for taxation is taken from a plat which was not made in compliance with the statute, still such description is sufficient provided a competent surveyor can locate the property therefrom, either with or without the aid of other plats, about which there is no question.

3. SAME—*when property owner is bound by description of property for taxation.* If the description of property for purposes of taxation is the same as that by which the owner acquired his title, such description will be good against him for the reason he has adopted such description.

4. SAME—*ordinance levying a school tax need not specify in detail the objects of the tax.* If the appropriation ordinance and the ordinance levying the tax for school purposes each provide for specific sums of money under two separate headings, one for new buildings and sites and the other for educational purposes, it is not necessary that the ordinances should separate into items the amounts required for new buildings and for sites, nor specify the items for educational purposes.

WRITS OF ERROR to the County Court of Cook county; the Hon. R. S. FARRAND, Judge, presiding.

JOHN D. ADAIR, and WILLIAM F. CARROLL, for plaintiffs in error.

EDWIN W. SIMS, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The writs of error in these cases have brought before us for review three judgments of the county court of Cook county entered against the lands of plaintiffs in error, on the application of the county collector, for the delinquent taxes of 1900. The principal question of law arising in them is common to all, and for that reason they have been heard together.

The question arises in each case on objection No. 5, that the description by which the property was designated in the assessor's and collector's books and collector's warrant was insufficient. The lots of the objectors in two of the cases and a part of them in the other case were described according to certain assessors' plats or subdivisions of lots or blocks in the city of Chicago, recorded in the recorder's office of said county. These plats were alleged to be void for a failure to comply with the provisions of the statute authorizing such plats to be made. The question is whether the descriptions, according to these plats, were valid and sufficient for the purposes of taxation. The surveys and plats were not made in compliance with the provisions of the statutes authorizing them, and therefore they do not have the effect given to legal plats by the statute, so as to make the descriptions, as set forth in them, good and valid descriptions of the lots. In order to make a plat a legal statutory one the provisions of the statutes must be complied with in all matters of substance. (*People* v. *Reat*, 107 Ill. 581). The plats must be regarded the same as if they had been made by the same persons without any statutory provision.

It has uniformly been held that property must be assessed and taxed by some description from which its locality can be determined and the property ascertained. In one case, a deputy county surveyor employed by the assessor of the county made a survey and subdivision of

a tract and platted it, and the plat was filed in the recorder's office but not recorded. Property described as lot 15 of that plat was taxed as the property of the Chicago and Alton Railroad Company. The owner of the land had not subdivided it, and it was not subdivided by the county clerk after the refusal of the owner. The lot did not represent any ascertainable part of the original tract, and, having no legal existence, the judgment of the county court refusing the application of the collector was affirmed. (*People* v. *Chicago and Alton Railroad Co.* 96 Ill. 369.) Again, in *People* v. *Dragstran*, 100 Ill. 286, lands were described as in section 1, Logan county, giving no township or range. The land was located as being in some section 1 of the county, but there were many sections of that number and nothing to show which was intended. It was held that a description of the property against which judgment was sought for taxes was essential, and that the application for judgment was properly refused. In *People* v. *Eggers*, 164 Ill. 515, the application was for a judgment for the sale of lots 25 to 48 of the subdivision of a certain block of land in Chicago for a delinquent special assessment. The block contained five or six acres, which had not been subdivided into lots. No lot represented any particular part of the block and none could be located or identified. It was held that an application for judgment should be refused if the land could not be identified, and the judgment of the county court refusing the application on that ground was held proper. In *People* v. *Clifford*, 166 Ill. 165, the owners had caused a plat of a subdivision to be made and acknowledged and it was approved by the trustees of the town of Cicero, but the subdivision was never completed by recording the plat. The property appeared of record as unsubdivided, and there were no lots described against which taxes or liens for taxes could attach. The application was for judgment for an installment of a special assessment, and being against property which

had no existence it was held proper to refuse it. In *People* v. *Reat*, *supra*, an assessor's plat had been made for the purpose of taxation, but neither the location nor the quantity of land taxed could be known. Judgment having been refused by the county court, the judgment was affirmed. In *Upton* v. *People*, 176 Ill. 632, the application for judgment for a delinquent special assessment was based on a subdivision by school trustees and an assessor's plat. There was no evidence of the subdivision by the school trustees, and the description resting alone on an assessor's plat not made according to law, was held insufficient to authorize a judgment. The property assessed was not so described as to be capable of identification.

Counsel for defendant in error contend that there is some distinction between special assessments and general taxes in respect to certainty of description; but no such distinction has ever been observed, as will be seen from these decisions, and we know of no reason for any difference. If the descriptions by these plats were descriptions of certain specific pieces of property which could be found and identified they were sufficient, but if they were descriptions of property which neither had a legal existence nor was capable of identification they would not support a judgment for taxes.

In each of these cases three witnesses, who were competent surveyors of long and general experience in their profession in the city of Chicago, testified, on behalf of the People, that they were able, from the description given, to locate and identify the property in question with absolute certainty. Each had made surveys and plats and was familiar with the same and with the customs prevailing in the business of surveying, followed, used and acquiesced in by surveyors generally. Each testified that if the assessor's plat were given him he could take the original plat of the city and additions, about which there was no question, and make a survey

in accordance with the assessor's plat and locate and identify the property. There was no contradiction of this testimony. The original town of Chicago and its additions were laid out into lots and blocks, and the plats in question showed certain streets and blocks of such original plat, with streets familiarly known to every citizen, and showing their intersections and the relation of the property to them. The courts have sometimes found, from mere inspection of a plat, that the property could be identified from monuments and distances appearing upon it, and it has always been held that a description of property which is sufficiently definite to enable a surveyor to locate it with certainty, either with or without extrinsic evidence, is sufficient, either in a conveyance or for the purpose of taxation. Lands may be conveyed by any description from which they can be identified, and such a description will be perfectly valid. In *Choteau* v. *Jones*, 11 Ill. 300, the lands in a deed were described as "two entire sections of land in the Marine settlement and State of Illinois, and patented to said John Rice Jones." The description was held sufficiently definite and certain, since the locality was well known, and upon the examination of the proper records it could be ascertained which two sections of land had been patented by the grantor. In *Colcord* v. *Alexander*, 67 Ill. 581, it was held that any description adopted in a deed by which the premises intended to be conveyed may be established and identified is sufficient, and that extrinsic evidence may always be used to identify and establish the objects of the calls in the deed. Again, in *Stevens* v. *Wait*, 112 Ill. 544, the same rule was announced. In *Taylor* v. *Wright*, 121 Ill. 455, the same rule was applied to a tax deed. It was there contended that the description by which the property was assessed and taxed was void for uncertainty, but on the authority of the previous decisions the description was held sufficient. It was said that the terms used were to be construed with reference

to the known customs of those whose duty it was to describe property for the purpose of taxation.

In some of our decisions it has been said that the rule is less stringent as to description of property for taxation than in a conveyance. That statement, perhaps, needs some qualification. A conveyance of all the lands of the grantor in a county or township would be good in a conveyance, and in construing deeds the courts endeavor to discover the intention of the parties and give it effect. A description that would be good between the grantor and grantee might not always be good for purposes of taxation. (Blackwell on Tax Titles, 124.) A description for purposes of taxation, however, is to be construed with reference to the well known customs in describing property for purposes of taxation with respect to letters, characters and abbreviations. A description which would be sufficient in a conveyance is doubtless generally sufficient for taxation. If the description is the same as that by which the owner has acquired title, he will, of course, not be misled in any way, and the description will be good against him for the reason that he has adopted it. In these cases the Title Guarantee and Trust Company acquired its title to the premises taxed through instruments describing them according to the assessor's plat, and the Chicago Auditorium Association acquired most of its lots by like descriptions. The purpose of the description is to give the owner information of the claim made against his property, and in case of sale to inform the public what land is offered for sale and to enable the purchaser to obtain a sufficient conveyance. If the land is described with sufficient particularity for these purposes it is all that will be required. (Cooley on Taxation, 283.) In *Law* v. *People*, 80 Ill. 268, it was said that for the purposes of taxation any description by which the property may be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, will be sufficient. In that case the

court concluded that any competent surveyor could locate the property without extrinsic aid. In *Fowler* v. *People*, 93 Ill. 116, a surveyor was introduced as a witness, who testified that he would have no difficulty in locating the land assessed by the description given, and the rule of law was again declared in that case. In *People* v. *Stahl*, 101 Ill. 346, the certificate of the surveyor of the town of Effingham misdescribed the tract on which the town was in fact laid out. There were monuments on the ground actually subdivided to mark the boundaries. It was held that the description was sufficiently definite and certain, and that any surveyor with the plat, by aid of the monuments on the ground, could locate the objector's lots and identify them as the identical lots described in the county clerk's subdivision. In *Greenwood* v. *Town of LaSalle*, 137 Ill. 225, a description which, standing alone, was uncertain, was held to be intelligible when taken in connection with that preceding it, and to be sufficient. In *Cairo, Vincennes and Chicago Railway Co.* v. *Mathews*, 152 Ill. 153, the right of way of the railroad company was given an erroneous description, but it was held sufficient where a competent surveyor would have no difficulty in locating and identifying the right of way through the county. The undisputed evidence in the records before us brings the descriptions of the lots of plaintiffs in error within the rule established by these decisions.

What has been said disposes of the objections, with the exception of one interposed by the Chicago Auditorium Association to the tax levied for school purposes. The objection was, that the appropriation ordinance passed by the city council, upon which the tax was based, did not specify the objects and purposes for which the appropriation was made and the amount appropriated for each object or purpose, and that the ordinance levying the tax did not specify, in detail, the purposes for which the appropriations were made and the sum or amount appropriated for each purpose, respectively, as

required by the act for the organization of cities and villages. The appropriation ordinance and the ordinance levying the tax each provided for specific sums of money under two separate headings, one for new buildings and sites and the other for educational purposes. The objection argued is, that the ordinance levying the tax must show on its face the items for which the money is appropriated and the tax levied, and that the tax cannot be levied in two lump sums. It is urged that the ordinance should have separated into items the amount required for new buildings and the amount required for sites, and that the phrase "educational purposes" is too broad and not specific. The statute provides that the board of education shall annually, before the first day of August, certify to the city council, under the hands and seals of the president and secretary of the board, the amount of money required to be raised by taxation for school purposes in the district for the ensuing year, and the city council shall thereupon cause the said amount to be levied and collected in the same manner provided by law for the levy and collection of taxes for school purposes of such district. (Act of 1879, sec. 4; Hurd's Stat. 1899, p. 1574.) The board of education of the city of Chicago certified to the city council the amount required for the establishment and support of schools for the year 1900, stating certain sums as required for new buildings and sites and a certain sum for educational purposes. It was then the duty of the city council to cause the same to be levied and collected in the same manner provided by law for the levy and collection of taxes for school purposes. In the administration of the School law the city council performs the same functions as the school authorities in school districts generally, and may levy a tax not exceeding two and one-half per cent for educational and two and one-half per cent for building purposes. (School Law, art. 8, sec. 1; Hurd's Stat. 1899, p. 1555.) In that act the terms "educational purposes" and "school purposes"

are used interchangeably, and the legislature have fixed the form of certificate for the levy of school taxes by school directors. The certificate is to state the sum required for school purposes and the sum required for building purposes. (School Law, art. 8, sec. 2; Hurd's Stat. 1899, p. 1556.) It is not necessary to go into the items of either or to make a further specification, and the ordinance in this case was a full compliance with the law.

The judgment of the county court is affirmed.

Judgment affirmed.

THE PEOPLE, for use, etc.

v.

JAMES L. LEHR.

Opinion filed April 16, 1902.

1. MEDICINE AND SURGERY—*question what is "practicing medicine" is not one for expert opinion.* On the trial of a vendor of an appliance to relieve rheumatism, for violating the act to regulate the practice of medicine, it is proper for the court to refuse to allow a physician called as an expert witness to state whether a person prescribing a medical device, claiming that it will cure rheumatism, "would be regarded as practicing medicine, as you understand the term."

2. SAME—*party recommending and selling device for relieving pain is not practicing medicine.* A person who recommends and offers for sale an instrument called an "oxygenor," to be attached to the wrist or ankle for relieving rheumatism, is not practicing medicine within the meaning of the act of 1899, regulating the practice of medicine.

3. SAME—*what must be shown to sustain conviction under section 8 of act of 1899.* To sustain a conviction for violating section 8 of the act of 1899, to regulate the practice of medicine, (Laws of 1899, p. 275,) it must be shown that the person selling the drug or appliance which he has publicly recommended to relieve pain was an itinerant vendor thereof.

People v. *Lehr*, 93 Ill. App. 505, affirmed.

WRIT of ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

WHITMORE, BARNES & BOULWARE, for plaintiff in error.

L. A. GILMORE, (FRANK P. BLAIR, of counsel,) for defendant in error.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a writ of error to the Appellate Court for the Second District, to reverse a judgment of that court affirming a judgment of the circuit court of Peoria county acquitting defendant in error of a violation of the act entitled "An act to regulate the practice of medicine in the State of Illinois," etc. (Hurd's Stat. 1899, p. 1143.) The suit seems to have been begun before a justice of the peace by the People, for use of the State Board of Health, without any written complaint or other statement from which we can determine the section of that act which the defendant was charged with violating, but it seems to be insisted in the argument that what he did was contrary to both sections 7 and 8. The judgment of the justice of the peace was for the defendant. The People prosecuted an appeal to the circuit court, where, upon a trial *de novo* before a jury, he was again acquitted, and that judgment has been affirmed by the Appellate Court.

Many assignments of error on the record from the Appellate Court are here insisted upon, but they are, without exception, assignments questioning the correctness of the views of the Appellate Court as expressed in its opinion, and, of course, raise no question here upon the record. We can consider here only such assignments of error upon the rulings of the trial court as raise questions of law, the verdict of the jury and judgment of affirmance of the Appellate Court having conclusively settled all controverted questions of fact. But two such errors are here assigned: First, that the circuit court erred in

excluding competent evidence; and second, in refusing to give certain instructions asked on behalf of the People.

We gather from the testimony that the offense with which the defendant was charged was that of selling, offering to sell and advertising for sale a device called an "oxygenor or perfected oxygenor king." It was designed to be attached to the wrist or ankle of a person suffering pain, whereby, as was claimed by the defendant, oxygen or oxygen gas was generated and introduced into the body. The defendant did not profess to treat patients with this device farther than to recommend its use, and perhaps, in some instances, instruct persons how to use it. He had an office in the city of Peoria, from which he advertised and attempted to sell the oxygenor. The advertisements were, as is usual in such cases, extravagant, but the evidence does not show, or even tend to show, that he was an itinerant vendor of it.

The only criticism made upon the ruling of the circuit court in the exclusion of testimony is, that it refused to allow a physician, Dr. Edward Hasson, to answer the question, "State whether or not, in your opinion, a person prescribing a medical device, claiming that it will cure rheumatism, etc., would be regarded as practicing medicine, as you understand the term?" Manifestly, the question was improper. The statute defines the practicing of medicine, and it was for the jury, and not for a witness, even though he might be called an expert, to say whether certain conduct amounted to the practice of medicine. In other words, this question seeks to have the witness decide the very ultimate question which the jury had been sworn to try. The court properly sustained the objection to it.

Three instructions were asked on behalf of the People, all of which were refused. The first is to the effect that the act under which the prosecution was had is constitutional. No such issue was before the jury. The defendant did not deny the constitutionality of the law. The

second stated that the only defense was the introduction of the instrument or device styled the "Oxygenor King," and that if the jury found, from the evidence, that the defendant prescribed the same to persons suffering from physical ailments, and recommended it as a means of cure or relief for such ailments, and that he did so without first obtaining a license therefor from the State Board of Health, then and in that case they should find the defendant guilty and assess his fine as provided by statute. This instruction, in view of the facts of the case, does not correctly state the law. The defendant did not "treat, or profess to treat, operate on or prescribe for any physical ailment, or any physical injury to or deformity of another." He simply offered and recommended the oxygenor for sale. He was practicing medicine, within the meaning of the statute, no more than is the druggist or pharmacist who sells and recommends surgical instruments, atomizers and innumerable other appliances used by the afflicted. If this instruction should be held to announce the correct rule of law, then any neighbor or friend who might prescribe or recommend the use of a particular instrument or device would be guilty of a violation of the statute, which is certainly not in accord with the spirit of the act or the intention of the legislature. The third instruction seems to have been intended to define the practice of medicine, although it says that "medicine is the art of understanding diseases and curing and relieving them when possible," etc., and then attempts to define it. The instruction as printed in the abstract is meaningless, and in no view could it have any proper application to the case.

The only possible ground upon which the defendant could have been properly convicted would have been that his conduct was a violation of section 8 of the statute, which provides "that any itinerant vendor of any drug, nostrum, ointment or appliance of any kind intended for the treatment of diseases or injury, who shall,

by writing or printing, or any method, profess to the public to cure or treat disease or deformity by any drug, nostrum or application, shall pay a license," etc. Admitting that the oxygenor is an *appliance*, within the meaning of this statute, the evidence did not show that the defendant was an itinerant vendor of the same. It is unnecessary to say that this, like all other penal statutes, must be strictly construed. The statute in question is a wise and humane one, and, within its reasonable construction, to be rigidly enforced; but any attempt to make it cover cases like this would be an abuse rather than an enforcement of it.

The judgment of the Appellate Court is right, and it will be affirmed.

Judgment affirmed.

OTTO RADLOFF

v.

OTTO HAASE.

Opinion filed April 16, 1902.

1. CONTRACTS—*when amount agreed to be paid for breach of contract is not controlling.* In the absence of a specific statement that the amount agreed to be paid for breach of contract shall be liquidated damages, or even in cases where it is so stated, if the actual damages can be readily ascertained and it would be obnoxious to reason to enforce the provision, courts will regard the amount stated as a penalty, and limit the recovery to actual damages sustained.

2. SAME—*when case for breach of contract must go to the jury.* If the evidence tends to show a breach of a legal contract the plaintiff is entitled to have his case submitted to the jury, and it is error for the court, in such case, to direct a verdict for the defendant.

Radloff v. *Haase*, 96 Ill. App. 74, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. M. KAVANAGH, Judge, presiding.

J. HENRY KRAFT, for appellant.

A. G. DICUS, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an action of debt, brought in the superior court of Cook county by appellant, against appellee, laying damages in the sum of $5000 for a breach of the following contract entered into between the parties:

"For and in consideration of the payment to me of the purchase money of $1400, it is hereby stipulated and agreed by and between the parties, and especially covenanted by Otto Haase, that for and during the period of the next five years he will not commence, start or run what is known as a 'bakery' business; that he will not engage in said business, either by himself or by agents, within a radius of five blocks from 442 North Ashland avenue, being the premises sold by me and purchased this day by Otto Radloff; and I, the undersigned, Otto Haase, hereby agree to pay to the said Otto Radloff the sum of $2000 in case above agreement shall be violated by me, unless the said Otto Radloff shall give consent to me to commence or start a bakery business within a radius of five blocks, both east, west, north or south of said 442 North Ashland avenue.

"In witness whereof I have hereunto set my hand and seal this 7th day of February, A. D. 1894.

OTTO HAASE. [Seal.]"

The case was brought in the superior court of Cook county, and after plaintiff had put in all of his evidence and rested, on motion of counsel for defendant the court instructed the jury to find the issues for the defendant. Appellant appealed to the Appellate Court for the First District, which affirmed the judgment of the trial court, and he now brings this case here for review.

It appears from the evidence that at about the date of the above contract appellee sold to appellant his bakery business for the sum of $1400, which was paid, and the latter carried on that business until about the first of September, 1896, when he sold out to Frank Hoffman, who thereafter continued the business for about a year, when he sold out, both of these sales being made, so far

as the evidence shows, without any reference to the agreement between appellant and appellee. As soon as appellant sold out to Hoffman he left Chicago, and at the time of the trial was in the west,—just where does not appear,—and it nowhere appears that he has, since leaving Chicago, returned or made any attempt to carry on the bakery business at any place. In the fall of 1897 appellee again engaged in the bakery business across the street from No. 442 North Ashland avenue, which is within the prohibited territory mentioned in the agreement. There is no evidence that he obtained appellant's consent to again engage in this business. There is no evidence in the record tending to show that appellant has sustained any actual damages by reason of the breach of the agreement. On September 1, 1896, appellant gave his attorney in this case a power of attorney authorizing him to bring suit upon and enforce the conditions of said agreement, and to collect any benefit or advantage arising therefrom, and any amount that might become due or be recovered by virtue of the agreement.

The only question presented to us for consideration is, that the trial court erred in directing a verdict for defendant below, appellant's chief contention being that the contract in question is a contract providing for a penalty, and not for liquidated damages, and proof of actual damages was not necessary.

By the terms of the contract we cannot determine whether it was in the minds of the parties that the sum named should be regarded as liquidated damages or as a penalty by which the maximum recovery should be limited, as no expression is used therein designating its character. It seems that in the absence of a specific statement that the amount named shall be as liquidated damages, and in cases where it is so stated if the actual damages can be readily ascertained or if it would be obnoxious to reason to enforce it, the tendency of the courts is to regard the amount stated as a penalty and limit the recov-

ery to the actual damages sustained. We find the clearest illustration of the rules of law applicable to contracts containing terms of liquidated damages and of penalties laid down in the three cases of *Scofield* v. *Tompkins*, 95 Ill. 190, *Poppers* v. *Meagher*, 148 id. 192, and *Iroquois Furnace Co.* v. *Wilkin Manf. Co.* 181 id. 582. In *Iroquois Furnace. Co.* v. *Wilkin Manf. Co. supra*, we said (p. 604): "If the amount agreed to be paid for breach of the contract greatly exceeded the actual damages suffered by the appellant, * * * that is to say, if the amount agreed to be paid is out of proportion to the probable damages sustained, the court will be disposed to treat the stipulated sum as a penalty." And in *Scofield* v. *Tompkins*, *supra*, on page 193, quoting from Sedgwick on Measure of Damages, we said: "The courts, especially in this country, have generally shown a marked desire to lean towards that construction which excludes the idea of liquidated damages and permits the party to recover only damages which he has actually sustained. The language of the contract is not controlling. If, indeed, the word 'penalty' be used, as we shall see hereafter, it will never be construed as a sum absolutely fixed. But the reverse is by no means the case, and the phrase '*liquidated damages*' has often been made to read '*penalty*.'"

Whether the term "liquidated damages" is used or not, the idea of the courts is to ascertain, if possible, the actual damages sustained, and if it is possible to ascertain the actual damages, or if the amount of liquidated damages mentioned in the contract is exorbitant, the court will construe the amount as a penalty, rather than as liquidated damages. It is said in the *Scofield case*, *supra*, that the phrase "liquidated damages" has often been made to read "penalty" if the strict construction of the phraseology would work oppression upon the obligor, or, if the enforcement of the contract would be unconscionable, the courts will then construe the amount named in the contract as a penalty. And it seems from

all the cases that, whatever may be the wording of the contract, the courts will admit evidence as to whether or not the strict enforcement of its provisions would work a hardship upon the obligor. In the case at bar it seems that Radloff had moved out west, and that his successor in the business did not have in view any provision of the contract between appellant and appellee when he succeeded appellant in business. If the contract could be construed as providing for liquidated damages, then, had appellee begun business but one day before the expiration of the stated terms, he would have been liable to appellant for the full $2000. It appears from the evidence that appellant, as a matter of fact, has not been engaged in the bakery business at Chicago a single day since appellee re-entered the restricted territory, nor has he been in any way injured by the action of appellee again commencing business within the prescribed territory, and to construe this contract as liquidated damages would work absurdity and oppression and be in conflict with all the adjudged cases in this State.

Notwithstanding our interpretation of the contract we think the trial court erred in directing the jury to find a verdict for appellee. The contract was legal and the evidence tended to establish a breach of it. Appellant was entitled to have his case submitted to the jury, and if they found a breach appellant was entitled to nominal damages at least, which could carry costs. (1 Sutherland on Damages, sec. 1.)

The judgments of the superior court of Cook county and of the Appellate Court are reversed, and the cause is remanded to the superior court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

EDWARD H. GUYER

v.

DAVENPORT, ROCK ISLAND AND NORTHWESTERN RY. CO.

Opinion filed April 16, 1902.

1. BILLS OF EXCEPTION—*when a bill of exceptions must be presented.* A bill of exceptions should be presented and signed at the term at which final judgment is rendered, except in cases where counsel consent, or the judge, by an entry of record, directs, that it may be prepared in vacation and signed *nunc pro tunc.*

2. NEW TRIAL—*what a motion for new trial is designed to review.* A motion for new trial is designed to bring in review before the trial court the occurrences of the trial, and hence motions upon the pleadings, and other matters arising before the trial is actually entered upon, furnish no basis for a motion for a new trial.

3. SAME—*when motion for new trial is improper.* If there has been a trial of an issue of law on a demurrer or motion, or an issue of fact has been tried upon a motion, a motion for new trial is improper and unnecessary to secure a review of the final order.

4. SAME—*motion for new trial only necessary where case has been tried by jury.* If a case has been tried before the court without a jury, a motion for new trial is unnecessary to preserve the questions arising upon the record, as an exception to the finding and judgment of the court will raise the question.

5. SAME—*when questions are not preserved by continuance of a motion for new trial.* Alleged errors of the court, in a condemnation proceeding, in treating the petition as having been filed in vacation and in ordering summons to issue, are not proper matters to be embodied in a motion for new trial, and hence are not preserved by a continuance of the motion for new trial so as to permit their being preserved in a bill of exceptions presented and signed at a term after the alleged errors were committed.

6. APPEALS AND ERRORS—*when motion to expunge matters from bill of exceptions will be allowed.* The questions arising in condemnation proceedings before the submission of the case to the jury are to be determined summarily by the court, and the court's rulings thereon must be preserved by a bill of exceptions settled at the term when they were made or upon time allowed by the court, and matters relating thereto will be expunged from a bill of exceptions presented and signed at a subsequent term, although the rulings were assigned as reasons for a new trial and the motion for new trial continued to such term.

7. EMINENT DOMAIN—*when verdict will be sustained on appeal.* A verdict awarding damages in a condemnation proceeding will not

be disturbed on appeal unless grossly inadequate or excessive, where evidence was conflicting and the jury viewed the premises.

8. SAME—*right of jury to base compensation upon their own view of the premises.* If the jury believe, from the whole evidence, that they have arrived at a more accurate judgment as to the value of the premises sought to be taken and of the amount of damages, if any, than is shown by the evidence in open court, they may, upon the evidence, rightfully fix the compensation at the amount approved by their judgment, formed from their view of the premises as a jury, even though it differs from the weight of testimony.

9. SAME—*effect where property is purchased and other property subsequently condemned.* All benefits, as well as damages, arising from the location and construction of a railroad upon property purchased for the purpose must be regarded as settled in that transaction, and neither party, in a subsequent proceeding to condemn additional land of the same owner, can have such benefits or damages considered.

APPEAL from the County Court of Rock Island county; the Hon. LUCIAN ADAMS, Judge, presiding.

This was a petition to condemn certain lands of appellant, lying in the town site of East Moline, for railroad purposes, presented by appellee to the county judge of Rock Island county on March 13, 1901, who endorsed thereon the day of presentation and set the hearing for March 25, 1901, and ordered summons to issue. Thereafter the appellant moved to quash the summons, but the motion was overruled. He then moved to dismiss the petition. On this motion a hearing was had before the court. The court overruled the motion and an exception was taken by the appellant. A jury having been called, appellant interposed a challenge to the array, which challenge was overruled. The jury was then empaneled and sent to view the premises. The appellant then filed his cross-petition for compensation to land damaged but not taken. On motion by the petitioner to strike out a portion of this cross-petition the court allowed the motion as to a part and overruled it as to the remainder, and exceptions were taken by both parties. The trial resulted in a verdict of $1925 as compensation

for land taken and no damages to land not taken. The appellant entered and filed his motion for a new trial, which motion was continued to the next (July) term of the court, when it was overruled and judgment rendered on the verdict. There was no motion in arrest of judgment. From this judgment the appellant has appealed to this court.

SEARLE & MARSHALL, and W. R. MOORE, for appellant:

The jury cannot reject the evidence of witnesses and render a verdict on their own judgment derived from a view of the premises. *Peoria Gas Light Co.* v. *Terminal Co.* 146 Ill. 372; *Hercules Iron Works* v. *Railway Co.* 141 id. 491; *Railway Co.* v. *Schneider*, 127 id. 144; *Green* v. *Chicago*, 97 id. 373; *Mitchell* v. *Railway Co.* 85 id. 566.

Instructions which repeat propositions already given, or are argumentative, or which give unfair prominence to portions of the evidence, or suggest inferences to be drawn therefrom, should be refused. *Pyle* v. *Pyle*, 158 Ill. 289; *Rutherford* v. *Morris*, 77 id. 435.

Instructions, though correct, should not be repeated so many times as to assume the character of an argument. *Wilmerton* v. *Sample*, 39 Ill. App. 60.

While the necessity for and the exercise of the delegated power of eminent domain within the scope and for the uses and purposes named in the legislative grant is not a proper subject for judicial interference, yet courts are clothed with ample power, in condemnation proceedings, to prevent any abuse of such power, and will exercise their authority to prevent such abuse in the proper case. *Railroad Co.* v. *Wiltse*, 116 Ill. 449; *Railroad Co.* v. *Lake*, 71 id. 333; *Schuster* v. *Sanitary District*, 177 id. 626; *Railroad Co.* v. *Railway Co.* 148 id. 509; *Smith* v. *Railroad Co.* 105 id. 511; *Ligare* v. *Railway Co.* 166 id. 255.

JOE R. LANE, and SWEENEY & WALKER, for appellee:

A bill of exceptions not signed in time should be stricken from the files, on motion. *Burst* v. *Wayne*, 13 Ill.

664; *Railway Co.* v. *People*, 106 id. 652; *Dougherty* v. *People*, 118 id. 160; *Hake* v. *Strubel*, 121 id. 321; *Harris* v. *People*, 138 id. 63.

Appellant's motions to quash, dismiss and challenging the array of jurors were overruled by the court at the March term, 1901, yet he did not at that term move the court to sign a bill of exceptions to preserve his exceptions. He therefore waived and lost the right to preserve them in this record. *Evans* v. *Fisher*, 5 Gilm. 453; *Burst* v. *Wayne*, 13 Ill. 664; *Railway Co.* v. *People*, 106 id. 652; *Harris* v. *People*, 138 id. 63; *Hake* v. *Strubel*, 121 id. 321; *Belford* v. *Beatty*, 46 Ill. App. 539; *State* v. *Ware*, 69 Mo. 332; *Hurt* v. *King*, 24 Mo. App. 593; *McDonald* v. *Algeo*, 96 Ill. App. 79; *Kelsey* v. *Hay*, 84 Ind. 189.

Exceptions to the decisions of the court upon appellant's motion to quash, dismiss and challenging the array of jurors, rendered at the March term, should have been preserved in a bill of exceptions of that term, and could not be preserved in a bill of exceptions signed November 15, 1901, of the July term. *Belford* v. *Beatty*, 46 Ill. App. 539; *Harris* v. *People*, 138 Ill. 63; *State* v. *Ware*, 69 Mo. 332; *Hurt* v. *King*, 24 Ill. App. 593; *Cameron* v. *Taylor*, 71 Me. 27; *Pitzer* v. *Railway Co.* 80 Ind. 569.

The order allowing a bill of exceptions entered at the July term, upon overruling appellant's motion to "set aside the verdict and grant a new trial," at most only preserved exceptions to those questions. *Kelsey* v. *Hay*, 84 Ind. 189; *Pitzer* v. *Railway Co.* 80 id. 569.

The verdict of the jury is in accordance with the evidence, is reasonable, and this court will not disturb it. The jury saw the premises, which the court cannot do, and therefore their verdict must stand. *Railroad Co.* v. *Hopkins*, 90 Ill. 316; *Sanitary District* v. *Adam*, 179 id. 434; *McReynolds* v. *Railroad Co.* 106 id. 152; *Railway Co.* v. *Wolff*, 137 id. 360; *Sanitary District* v. *Cullerton*, 147 id. 389; *Cook* v. *Sanitary District*, 177 id. 599; *Railway Co.* v. *Lyons*, 159 id. 579; *Davis* v. *Railway Co.* 170 id. 601; *Railway Co.* v. *Leisy*

Brewing Co. 174 id. 547; *Railroad Co.* v. *Stauber*, 185 id. 9; *Kiernan* v. *Railway Co.* 123 id. 188.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellee has filed its motion in this court to expunge from the record that part of the bill of exceptions which relates to matters preliminary to the trial by the jury, except the plats afterwards introduced in evidence,—that is to say, the proceedings in relation to appellant's motion to quash the summons, motion to dismiss the petition of appellee and challenge to the array, and appellee's motion to strike out a part of appellant's cross-petition. The reasons assigned in support of this motion to expunge are, that this part of the bill of exceptions covers matters relating to the preliminary questions raised in settling the issue to be tried by the jury, all of which arose at the March term of the court; that no bill of exceptions was taken or filed or time given at that term for one to be settled; that the motion for a new trial made by appellant, which was continued to the July term of court, saved only the exceptions arising on the trial before the jury, and that the preliminary matters are therefore improperly in the bill of exceptions which was allowed at the July term. This motion was reserved to the hearing and will be first disposed of.

The subject of bills of exceptions was exhaustively considered in the case of *Hake* v. *Strubel*, 121 Ill. 321, where it was said (p. 326): "The duty imposed by the law upon the party alleging an exception and desiring to have the erroneous ruling and judgment reviewed in an appellate court, to present his bill to the trial judge for settlement and allowance, signature and sealing, at the term when such alleged erroneous ruling or judgment was made, or within such time as the parties, by their agreement made part of the record, might stipulate, or within the time allowed by the court in its order to that effect appearing in the record, has been often affirmed by this court." The

record before us contains no order at the March term in reference to a bill of exceptions. However, as the cause was continued with the motion for a new trial pending, it is insisted that it was not necessary to file any bill of exceptions until that motion was disposed of, and in support of their view counsel rely on *People* v. *Gary*, 105 Ill. 264. In that case, after quoting from *Evans* v. *Fisher*, 5 Gilm. 453, as follows: "A bill of exceptions should be reduced to form and signed during the term in which the cause is tried, except in cases where counsel consent, or the judge, by an entry on the record, directs, that it may be prepared in vacation and signed *nunc pro tunc*," it is said (p. 270): "Of course, what is meant by the expression, 'the term in which the cause is tried,' is the term at which the final judgment is rendered in the cause. It would be useless labor for a party to prepare a bill of exceptions before the motion for a new trial had been passed upon, as it could not be known whether the bill would be needed until the final action of the court on the motion." In *Village of Hinsdale* v. *Shannon*, 182 Ill. 312, it was said (p. 318): "When the motion for a new trial was so finally overruled the judgment became final, and a bill of exceptions could then be tendered to be signed by the judge."

Appellant contends that all the matters set up in his written motion for a new trial were, by the continuance of the motion to the next term, also continued to such term, so that a bill of exceptions could be settled in regard to them at that term. A motion for a new trial is designed to bring in review before the trial court the occurrences of the trial and to present for consideration alleged errors during the course of the trial. (*Alford* v. *Dannenberg*, 177 Ill. 331.) Motions upon the pleadings, and other matters arising before the trial is actually entered upon, furnish no basis for the motion for a new trial. (16 Am. & Eng. Ency. of Law, 610, 611.) We think the rule is correctly stated as follows: "A motion for a

new trial is proper only where there has been a trial of an issue of fact on the pleadings. * * * Where there has been a trial of an issue of law arising on a demurrer or motion, a motion for a new trial is improper and not necessary to secure a review of the final order. Where an issue of fact is tried on a motion, a motion for a new trial is improper and unnecessary, as the law contemplates such motion only after an issue of fact has been tried on the pleadings." (14 Ency. of Pl. & Pr. 853.) Grounds for a new trial do not include errors in rulings made before trial or after entry of judgment. "A new trial will not be granted on account of errors or defects in the pleadings. Errors in rulings on demurrers and motions relating to the pleadings may be reviewed on exceptions without a motion for a new trial. Such errors of law are not grounds for a new trial." 14 Ency. of Pl. & Pr. 827-829.

Appellant's motion for a new trial alleged (1) that the court erred in treating the petition as a petition filed in vacation; (2) that the jury was not drawn according to the statute; (3) that the court erred in overruling the motion to quash the summons; (4) that the court erred in overruling the challenge to the array; (5) that the court erred in overruling the motion to dismiss the petition; (6, 7, 8) that the court erred in respect to its rulings and action on a certain paper demanded by the appellant as evidence on the hearing on the motion to dismiss the petition; (9, 10, 11, 12) the court erred in the admission and exclusion of evidence and in the giving and refusing of instructions; (13, 14, 15) that the verdict was contrary to the law, to the evidence and to the law and the evidence.

The first, second, third and fourth reasons are all based on the contention that the court treated the petition as filed in vacation and ordered summons to issue and the jury to be drawn accordingly. The fifth, sixth, seventh and eighth relate to the motion to dismiss the petition, and the rest are applicable to the trial by the jury. The

fifth, sixth, seventh and eighth reasons assigned relate to rulings of the court in refusing to dismiss the petition, and could not affect the question tried by the jury. The only function for the jury was to fix the amount of compensation to be awarded for land taken and to determine the question of damages as to lands not taken. The court had already determined, without a jury, as is the correct practice, that the petition contained the proper jurisdictional averments and that they were true. The questions arising preliminarily to the submission to the jury, in such cases, are to be determined summarily by the court, and its rulings are subject to review. (*O'Hare* v. *Chicago, Madison and Northern Railroad Co.* 139 Ill. 151.) But such rulings are not properly embraced in a motion for a new trial. The motion was, and properly, "to set aside the verdict of the jury and grant a new trial." No errors committed in passing on the sufficiency or truth of the averments of the petition could be reached by such motion, and the assignment of such errors as reasons for the motion for a new trial should be disregarded by the court in passing on the motion. They were therefore not preserved by the continuance of the motion for a new trial to the next term, but should have been embodied in a bill of exceptions settled and filed at the March term, or time given by an entry of record for the same to be done at some future time. A motion for a new trial is only necessary where the case has been tried by a jury. If it has been tried by a court without a jury a motion for a new trial is unnecessary to preserve the questions arising upon the record. An exception entered to the finding and judgment of the court will raise the question. 2 Shinn's Pl. & Pr. sec. 964; *Sands* v. *Wacaser*, 149 Ill. 530; *Mahony* v. *Davis*, 44 id. 288.

The second reason given in the motion for a new trial, —that the jury was not drawn according to the statute,— is the same reason given in the challenge to the array. Whether the action of the court in overruling the chal-

lenge to the array is preserved by the motion for a new trial we are not called upon to decide, for, even if it were, we could not consider it because no exception to such action of the court in overruling the challenge appears in the bill of exceptions.

The motion to expunge will be allowed as to the matters indicated above and to the refusal to quash the summons, and overruled as to all others.

The assignment of errors is the same as the reasons assigned in the motion for a new trial. All the objections relating to the proceedings before the court which were preliminary to the trial by the jury to fix the compensation having been eliminated from the record, there remains but to notice the objections germane to the jury trial.

In the argument of appellant it is urged as error that the court struck out of the appellant's cross-petition the demand for compensation for the violation of a certain agreement claimed to have been made between appellant and appellee. Without determining whether this is properly in the bill of exceptions, it is sufficient to say that none of the errors assigned cover this contention, and it cannot be considered.

It is contended that the verdict of the jury is palpably unjust and against the preponderance and weight of the evidence. As is usual in condemnation proceedings, the estimates of the appellant's and appellee's witnesses on the question of damages are wide apart. The jury viewed the premises, and we do not know what weight they gave to the testimony of the witnesses or to what extent they relied upon the evidence obtained by them from their own view of the premises. We cannot, therefore, say whether the damages are inadequate and against the weight of the evidence or not. We do not regard the damages as grossly inadequate under the evidence in this case, and it is the settled doctrine of this court that the damages awarded by a jury in a condemnation proceed-

ing will not be disturbed where the evidence is conflicting and the jury viewed the premises. *Indiana, Illinois and Iowa Railroad Co.* v. *Stauber*, 185 Ill. 9, and cases cited.

It is in the next place contended that the court erred in giving to the jury, at the instance of the petitioner, each of the following instructions:

9. "The court further instructs the jury that the defendant, by selling to the petitioner the land for right of way, switch yard and railroad purposes, as testified by him, thereby settled for and released all damages to his other land occasioned by the use of the same for all railroad purposes, and that only the additional damages, occasioned by the laying of the road where it has, upon the land sought to be condemned, if you believe there is any such damage, can be considered by you in any event; and as against any such damages, *if any*, you may offset any special benefits which he receives by the location of the road, as shown by the evidence, including your view."

11. "The court further instructs the jury that the defendant is entitled to the fair cash market value of the land taken in this proceeding and to any damages to his other lands, if any, provided such damages, *if any*, exceed the special benefits, if any, which accrue to him, or said land not taken, by reason of the construction and location of petitioner's road upon his property in East Moline."

13. "The court further instructs the jury that if they believe, from the whole evidence, that they have, from personal examination of the premises, arrived at a more accurate judgment and determination as to the value of the premises sought to be taken and of the amount of damages, *if any*, than is shown by the evidence in open court, then and in that case they may, upon the evidence, rightfully fix the value of land taken and the amount of damage, *if any*, over and above special benefits, *if any*, at the amount so approved by their judgment, so formed

from personal examination of the premises as a jury, even though it may differ from the amount testified to, and from the weight of testimony given by witnesses in open court."

We do not find that the objection to the thirteenth instruction is well taken. It does not, as counsel contend, authorize the jury to fix the compensation from their own view of the premises without regard to the testimony in the case, but that part of the instruction relating to their own view is based upon the condition that "they believe, from the whole evidence, that they have, from personal examination of the premises, arrived at a more accurate judgment and determination as to the value of the premises sought to be taken and of the amount of damages, if any, than is shown by the evidence in open court." The instruction conforms to the law on this point as declared by this court in *Kiernan* v. *Chicago, Sante Fe and California Railway Co.* 123 Ill. 188, and *Chicago General Railway Co.* v. *Murray*, 174 id. 259.

But we are unable to agree with the court below in its view of the law as stated to the jury in said ninth and eleventh instructions. The evidence showed that appellant had previously sold and conveyed to the petitioner certain land for its right of way, etc., through his lands in East Moline, but that the petitioner found, after it had located and constructed its road thereon, that it needed additional land, and it filed its petition in this case to condemn the land now in question. The court instructed the jury, and properly, that in selling and conveying the land for such right of way, etc., appellant settled and released all damages to his other land caused by the sale and use of the land conveyed for railroad purposes, and could only recover any additional damages to other lands caused by the taking and use of the additional land sought to be condemned. But the same rule should also have been applied against the company to the special benefits to other lands which the jury were author-

ized to deduct from such damages. In other words, all such benefits, as well as damages, which arose from the location and construction of the road through East Moline on the land purchased of appellant were settled in that transaction, and neither party in the subsequent proceeding to condemn the additional land now in controversy could have such damages or benefits considered. In this respect these instructions were erroneous, and no other instruction given cured the error. They would lead the jury to understand that while the damages to land not taken were to be restricted to such as would be caused by the taking and use for railroad purposes of the land to be condemned, it would be proper to offset such damages by any special benefits the owner might receive from the location of the railroad through the town. This was clearly an erroneous view and prejudicial to appellant. Nor, in view of the verdict, can it be said that no harm was done to appellant by such instructions, for although it was shown that the land condemned was taken out of certain lots of appellant, leaving them separated into parts, nothing was allowed by the jury as damages to these parts of lots not taken, unless the jury found that such damages were overbalanced by the special benefits to such parts and to other lands. Compensation for the land actually taken only was allowed, and it may well have been that the jury considered that the damages to lands not taken, as properly restricted by the ninth instruction, were more than balanced by the benefits appellant received to all of his lands by the construction and use of the road and station in the town. The rule in regard to special benefits was in other respects not carefully stated, as said by appellant's counsel, but the material error was as we have pointed out.

For giving these instructions the judgment must be reversed and the cause remanded for another trial.

Reversed and remanded.

THE WESTERN STONE COMPANY
v.
VALENTINE MUSCIAL.

Opinion filed April 16, 1902.

1. MASTER AND SERVANT—*master must use due care to see that place of work is safe.* It is the master's duty to use reasonable diligence in seeing that the place where the work of his servant is to be performed is safe for that purpose; and in this respect the master and servant are not altogether upon an equal footing, since the servant's duty is obedience, and in acting under orders he assumes no risk unless he acts recklessly in obeying them.

2. SAME—*servant assumes only such risks as cannot be obviated by master's care.* The rule that a servant assumes the ordinary risks incident to the business, presupposes that the master has performed his duties of caution, care and vigilance which the law casts upon him, and it is those risks alone which cannot be obviated by the master's exercise of reasonable care that the servant assumes.

3. SAME—*when question of assumed risk is one of fact.* Whether a servant ordered to shovel from the bottom of a stone quarry dirt which had slid from the bank during the night, assumed the risk of the bank's caving in, is a question of fact for the jury under evidence that the servant looked at the bank but saw no danger, but that if the foreman had inspected the bank he would have discovered the bank was in a dangerous condition and that the same was about to fall.

4. SAME—*when servant's knowledge of danger is not an assumption of risk.* Even if a servant has some knowledge of the danger, yet the order of the master to proceed with the work relieves the servant of the assumption of the risk, unless the danger is so manifest that a person of ordinary prudence would not incur it.

5. SAME—*when instruction is properly refused.* An instruction that the employer "is under no greater obligation to look after the safety of an employee than the employer is to look after his own safety" is properly refused, where the evidence shows that the servant was working at the particular place under the master's orders.

Western Stone Co. v. *Muscial*, 96 Ill. App. 288, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

AMERICUS B. MELVILLE, HALEY & O'DONNELL, and FRANK J. CANTY, for appellant.

M. F. GIRTEN, T. F. CRONIN, E. MEERS, and A. M. LASLEY, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an action on the case, brought in the circuit court of Will county by the appellee to recover damages for personal injuries received by him, occasioned by the negligence of appellant while in its employ. A trial resulted in a verdict in favor of appellee for $4167, upon which verdict, after overruling a motion for a new trial, the court rendered judgment, which judgment has been affirmed by the Appellate Court for the Second District, and a further appeal has been prosecuted to this court.

The appellant, at the close of appellee's evidence, and again at the close of all the evidence, moved the court to instruct the jury to find for appellant, which motion was overruled by the court and exception taken thereto by appellant.

The evidence produced upon the trial of the case was highly contradictory. The evidence submitted by appellee tended to show that appellant, on August 22, 1898,—the day appellee was injured,—was operating a quarry near the village of Lemont, in Will county, and that appellee was employed to work therein by appellant, and under such employment had been working there for about three days. The night previous to the accident it had rained, and upon arriving in the morning at the quarry the men saw that during the night mud, clay and gravel had fallen from the face of the bank into the bottom of the quarry so as to interfere with the work then being done. Appellee, on the day in question, was ordered by the foreman of appellant to shovel this mud into wheelbarrows. At this point where appellee was working the

wall of the quarry rose perpendicularly for the distance of about twelve feet to the top of the rock. From the top of the rock the bank continued upward, in a slope, for about fifty feet. While the appellee was loading a wheelbarrow under the direction of the foreman, dirt and gravel slipped from the high bank above, and falling upon him caused the injuries complained of. Appellee was experienced in the work in which he was engaged and had been in the employ of appellant for about eight years, but had been working in this quarry but three days prior to his injury. After a rain there was a tendency for banks of this nature to fall, but this tendency varied according to the strata and composition of the banks. Several of appellee's witnesses testified that on the morning in question they noticed cracks in the bank over the place appellee was working and thought the same unsafe. Appellee himself looked at the bank but saw no defects in it and thought the same safe. The evidence produced by appellee tended to show that no inspection had been made by appellant on the day of the injury until after the injury to appellee occurred. It was not a part of appellee's duty to secure this bank, but appellant had in its employ certain men provided with a machine to "strip" the bank and to prevent its falling upon the men working in the quarry below, and the foreman of appellant was given orders "to look out for the bank every morning," but there is a conflict in the evidence whether on that morning these orders were obeyed by the foreman.

Appellant urges as reasons for reversal by this court, the overruling of its motion to find for the defendant, the refusal to give instructions numbered 13, 28 and 29, and the receiving and exclusion of certain evidence.

Appellant contends that it was error to refuse the instruction to find for the defendant, for the reason that appellee knew the bank was liable to fall under the existing conditions; that his knowledge of the danger was

equal to that of the master; that the danger of falling dirt was one of the perils of the business, and was, therefore, a risk assumed by appellee. The question whether appellee assumed the risk is a question for the jury. It is immaterial upon which side the evidence is introduced, if there is evidence which fairly tends to support plaintiff's case it must be submitted to the jury. Its weight and credit are matters for the jury, and this court will only look to see if there was evidence fairly tending to establish the plaintiff's right to recover. *Watson Cut Stone Co.* v. *Small*, 181 Ill. 366; *Pullman Palace Car Co.* v. *Laack*, 143 id. 242.

There was evidence adduced on the trial that appellant knew that under the conditions that existed the morning in question this bank was liable to fall. It made no examination of the bank, but, on the contrary, through its foreman, taking no precautions whatever, ordered appellee to work at this point. It is the duty of the master to use reasonable diligence in seeing that the place where the work of his servant is to be performed is safe for that purpose. This duty of appellant was disregarded by it, and when appellee obeyed its command to shovel or to load the dirt into the wheelbarrow, he had a right to rest upon the assurances which this command implied that there was no danger. The master and servant in such case are not altogether upon a footing of equality. The servant's duty is mere obedience, and when acting under an order he assumes no risk unless he acts recklessly in obeying it. Whether he acted thus recklessly or whether he acted as a reasonably prudent person should act are questions of fact to be determined by the jury. *Illinois Steel Co.* v. *Schymanowski*, 162 Ill. 447; *Chicago Anderson Pressed Brick Co.* v. *Sobkowiak*, 148 id. 573.

The rule that the servant assumes the ordinary risks incident to the business presupposes that his master has performed the duties of caution, care and vigilance which the laws casts upon him. It is these risks alone, which

cannot be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes. (*City of LaSalle* v. *Kostka*, 190 Ill. 130.) Appellee testified that when he went to work on the morning he was injured he looked at this bank and that he saw no danger in it. The testimony of other witnesses goes to show that had the foreman of appellant inspected the bank that morning he would have discovered there was a large crack in the same; that there was a projecting rock, and that a part of the bank and this rock were about to fall. With this state of proof, whether or not the servant assumed the risk of the falling rock was a question of fact, and this court is bound by the judgment of the Appellate Court. Even had appellee had some knowledge of the defect in the bank, yet the order of the master to proceed with the dangerous work would relieve him of the assumption of the risk, unless the danger was so manifest that a person of ordinary prudence would not have incurred it. (*Gundlach* v. *Schott*, 192 Ill. 509.) We think there was no error in refusing this instruction. It is true that this testimony produced by appellee was directly contradicted by that submitted by appellant, but as this court said in the case of *Wells* v. *Bourdages*, 193 Ill. 328: "It is not our province, however, to weigh the testimony or to determine where the truth of it lies. We are only required to look into it sufficiently to see if there is evidence fairly tending to establish a cause of action." In the case before us, unless a great part of the evidence of appellee is disregarded, there is sufficient evidence fairly tending to establish this cause of action, and therefore this instruction was properly refused.

It is also urged as error that the court improperly refused appellant's thirteenth instruction, which was as follows:

"The jury are instructed that the employer is under no greater obligation to look after the safety of an employee than the employee is to look after his own safety."

There was no error in refusing this instruction, for the reason, if no other, that it states an abstract proposition of law. "A party cannot complain that an instruction is refused if he fails to make an application of the rule of law to the evidence." (*Vallette* v. *Bilinski*, 167 Ill. 564.) But the instruction was erroneous in the fact that it wholly ignored that appellee was working at that particular spot under the order of appellant, and under such circumstances, as said in the *Schymanowski case*, *supra*, the master and servant are not altogether upon a footing of equality.

Complaint is also made of the refusal of the trial court to give appellant's twenty-seventh instruction, which was, in effect, that if the jury believed the defendant failed to warn plaintiff of the danger of the dirt falling from the bank upon him, and that plaintiff went to work under the bank in question after examining it or after a full opportunity to do so, then the law is the defendant did not owe to the plaintiff any duty to give him warning of any danger. That this instruction was properly refused will appear from what is said heretofore in regard to the refusing of appellant's peremptory instruction.

It is also assigned as error that the court improperly refused appellant's instruction 29. We cannot see how appellant could have been prejudiced by the refusal of the court to give this instruction. The rules of law therein stated were, by appellant's request, reiterated time and again and fully covered by instructions numbered 12, 14, 15, 16, 17, 18, 19 and 24. Some thirty instructions were given on behalf of appellant, and every phase of his case was fully covered thereby.

The appellant also urges that the court erroneously permitted appellee to introduce certain evidence and that it erred in excluding evidence offered by appellant. We regard the ruling of the court in this respect proper. The evidence objected to, which was introduced by plaintiff, related to the duties of the foreman. This was clearly

competent, and was a material element in the case to establish the relations which existed between appellee and the foreman and to what extent the appellee was subject to the foreman's orders. This was not a conclusion of the witness, because his testimony was to the effect that he knew what the foreman's duties were, and he then proceeded to state those duties. The evidence excluded by the court was properly excluded, as it was not cross-examination.

We are unable to find any error in the record which would call for a reversal, and the judgment is affirmed.

Judgment affirmed.

THE OLNEY LOAN AND BUILDING ASSOCIATION

v.

WILLIAM PARKER, County Collector.

Opinion filed April 16, 1902.

1. INJUNCTION—*equity may enjoin tax levied in violation of law.* A court of equity has jurisdiction to enjoin the collection of a tax not authorized by law and wholly illegal and void.

2. TAXES—*act of 1895, for assessing stock in loan associations, is valid.* The act of 1895, (Laws of 1895, p. 300,) which provides for assessing the stock of mutual building and loan associations to the stockholders and the real estate to the association, is valid, and an assessment of the property of such associations can be lawfully made only in accordance with its terms. (*In re St. Louis Loan and Investment Co.* 194 Ill. 609, followed.)

APPEAL from the Circuit Court of Richland county; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

JOHN LYNCH, Jr., for appellant.

Per CURIAM: This was a bill by appellant to restrain the collection of a tax levied against it for the year 1900, alleged to have been made in violation of the act approved April 30, 1895. It alleges that the local assessor

of the township of Olney, in said county, and the board of review, entered an assessment against the association on its personal property, capital stock and franchise, which was extended by the county clerk against it, amounting to $1227.40; that the tax so levied was not authorized by law but was wholly illegal and void. The defendant filed a demurrer to the bill, which was sustained, and an order entered by the trial judge dismissing the bill for want of equity at the complainant's costs. To reverse that order this appeal is prosecuted.

No briefs or arguments have been filed on behalf of the appellee.

There can be no question that a court of equity has jurisdiction to enjoin the collection of a tax levied in violation of law, as is here alleged. Of course, the demurrer admits the averments of the bill to be true. Under the act of 1895, which was in force when this tax for the year 1900 was levied, the local assessor should have listed for taxation against the stockholders of the association the number of shares of stock owned by each of them, respectively, and the value thereof, and assessed the same against such stockholder, to be collected in the same manner as other personal property. The act also provides: "The shares of stock and property of every such mutual building, loan and homestead association shall be assessed as herein provided, and not otherwise." (3 Starr & Cur.—2d ed.—chap. 120, p. 3414.) We recently held that this statute was valid, and that the assessment of property belonging to building and loan associations could only be lawfully made in pursuance of its provisions. (*In re St. Louis Loan and Investment Co. of East St. Louis*, 194 Ill. 609.) That case is decisive of this, and for the reasons stated in the opinion filed therein the decree of the circuit court of Richland county must be reversed.

Reversed and remanded.

MURRY NELSON *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 16, 1902.

1. SPECIAL ASSESSMENTS—*court has power to inquire whether division of improvement into sections was to evade the statute.* Courts may inquire whether the division of the improvement of a single street into sections, each costing less than $100,000 but aggregating more than that sum, was made to evade section 11 of the act of 1897, requiring proposed ordinances carrying $100,000 to be referred to a committee and published in full.

2. SAME—*ordinances dividing improvement to evade statute are void.* If no adequate cause is shown for dividing a single improvement into sections, each costing less than $100,000 but aggregating more than that sum, the ordinances are void, where they are all adopted at the same time and upon the night they were presented by the board, and each provides for the same kind of improvement on the same street, but for different, adjoining sections thereof.

APPEAL from the County Court of Cook county; the Hon. GEORGE K. INGHAM, Judge, presiding.

MASON & NOYES, for appellants.

EDGAR B. TOLMAN, and ROBERT REDFIELD, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county confirming a special assessment against the lands of appellants for the improvement of Archer avenue, in the city of Chicago, from the center line of South Ashland avenue to the east line of Western avenue boulevard, by curbing the same with granite concrete combined curb and gutter and grading and paving the street with asphalt on six inches of artificial hydraulic cement concrete.

It appears that the city council of Chicago at the same session passed three ordinances for improving Archer avenue a distance of about four miles. These ordinances

each provide for the same kind of an improvement, the first one being for the improvement of Archer avenue from State street to Stewart avenue, at a total estimated cost of $36,000; the second, from Stewart avenue to Ashland avenue, at an estimated cost of $98,500; and the third, from Ashland avenue to Western avenue boulevard, at an estimated cost of $72,000, the latter being the ordinance now before us. The cost of these three improvements, or of any two of them, exceeds $100,000. It is contended for appellants that this was an attempt of the city council to evade the provisions of section 11 of the act of 1897 in regard to local improvements, which is as follows: "Upon the presentation to the common council or board of trustees of such proposed ordinance, together with such recommendation and estimate, if the said estimate of cost shall exceed the sum of one hundred thousand dollars ($100,000), (exclusive of the amount to be paid for land to be taken or damaged,) such ordinance shall be referred to the proper committee and published in the proceedings of the council or board of trustees, in the usual way, in full, with the recommendation and estimates, at least one week before any action shall be taken thereon by the council or board of trustees." (Hurd's Stat. 1899, p. 364.) None of these ordinances was referred to a committee or published, as provided in the above section, but all were passed by the council on the evening of the same day they were presented by the board of local improvements.

Appellants insist that the dividing up of the improvement of Archer avenue into three sections shows on the face of it that it was done to evade the provisions of the statute above quoted. It is said that all the facts and circumstances show that these three ordinances, passed as they were, should be read and construed together as one entire scheme. On the hearing of this objection in the court below the court, on its own motion, called as a witness the superintendent of special assessments and in-

quired into the reasons of the board of local improvements for thus dividing the improvement of Archer avenue into sections. His answer was, that the public benefits in the different portions of the street were different, amounting to forty or forty-two per cent in the first section and to about fifteen per cent in the other two sections. On being asked why the part on which the public benefit was fifteen per cent was divided into two sections, he answered that this simply happened so in the usual course of doing business in the board. Appellants objected to the admission of this testimony, on the ground that it threw no light on the action of the city council, and that it would be improper and irrelevant to inquire into the motives of the council in passing these ordinances as they did. The court made the record show that he asked for this testimony for his own personal information. No evidence was offered by appellants on this subject.

In support of the action dividing the improvement of Archer avenue into three sections, it is urged by the appellee that the subject matter of each ordinance was different from the others, the territory covered by each being entirely different; that each ordinance was entirely independent of the others, and that the character of the property and the public benefit are different in each ordinance. It is also urged that the municipal authorities are the sole and only judges of the necessity for and of the mode, manner and extent of a proposed improvement.

That it was the object of the legislature in passing the Local Improvement act of 1897 to provide additional safeguards for the protection of the interests of the property owners is evident from an inspection of the act itself and of the statutes it superseded. Provisions were introduced for the property owners to be heard before the board of local improvements as a preliminary step in the proceeding, which is one of the important provisions of the act not contained in former statutes, (*Givins* v. *City of Chicago*, 188 Ill. 348,) and we have no doubt that notice of

such hearing must be given and that it is jurisdictional. As a further safeguard, it is provided that when the estimated cost of the improvement exceeds $100,000 the ordinance shall be referred by the council to the proper committee and published in the proceedings of the council in full, with the recommendations and estimates, at least one week before action is taken thereon. There can be no other reason assigned for this provision than that it was enacted to prevent hasty action, and to give to the public and the property owner an opportunity to obtain full and specific information concerning the proposed improvement and of the terms of the ordinance before the ordinance is passed. While it is true that the council is finally the sole judge of the mode or manner to be adopted in making a public improvement and of the extent of such improvement, still, that does not preclude an inquiry by the courts whether in prescribing, by ordinance, such mode, manner and extent, the requirements of the statute have been complied with. If the statute above quoted can be evaded by dividing this improvement, costing upwards of $200,000, into three sections, each falling within the $100,000 limit, as was done in this case, it can be evaded in every other case and rendered wholly nugatory.

As before said, the city council is the judge, subject to the provisions of the statute, of the extent of the improvement to be provided for by the ordinance, and may, of course, provide for different improvements by different ordinances passed at the same session; but if, in reality, the improvements proposed are but a single one and exceed in cost $100,000, it is a proper subject of inquiry by the courts whether such division was or was not made to evade the statute; and in order to arrive at the solution of the inquiry it is proper to examine the separate ordinances covering the improvement or improvements, the estimates, the assessment roll, and all other documents, records and proceedings in the case which throw light

on the question. To do this would not involve an inquiry into the motives of the city council, but would only involve the determination of the question as to the object and purpose of the division, respecting the question whether it was or was not an evasion of the statute. (*Ligare* v. *City of Chicago*, 139 Ill. 46.) In the case at bar the improvements, as provided for in the three ordinances, were in reality but one improvement and of a part of one street. The nature and character of the improvements and the materials to be used, provided for in the three ordinances, were the same, and without attempting to lay down any general rule applicable to all cases involving this question, it is sufficient to say that the record shows that there was no adequate cause for the division of this improvement into three separate ones, and that the only apparent purpose was to evade the statute requiring reference to a committee, postponement of action for one week and publication in full in the proceedings of the council. Substantially the same views were expressed in *Kerfoot* v. *City of Chicago*, 195 Ill. 229.

We are of the opinion that the ordinance is void, and it must be so held and the judgment reversed.

Judgment reversed.

IDA JOHNSON

v.

MICHAEL C. MCDONALD *et al.*

Opinion filed April 16, 1902.

APPEALS AND ERRORS—*freehold not involved in proceeding to cancel certificate of sale as a cloud.* A freehold is not involved, so as to permit a direct appeal to the Supreme Court, in a proceeding to set aside a certificate of sale as a cloud on title, since the certificate does not convey or purport to convey title.

APPEAL from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

BANCROFT & ADAMS, for appellant.

EDWARD MAHER, for appellee M. C. McDonald.

Per CURIAM: A motion has been made in this case to dismiss the appeal for want of jurisdiction in this court, upon the ground that no freehold is involved. The motion, the decision of which was reserved to the hearing, must be allowed.

The bill was filed on September 11, 1901, by the appellee, Michael C. McDonald, against the appellant, Ida Johnson, and the appellee, Ernest J. Magerstadt, for the purpose of removing a cloud upon the title of McDonald to four certain lots. The bill alleges that the complainant is in possession of the premises. It also alleges that, on April 5, 1901, an execution was issued from the superior court of Cook county on a judgment, rendered at the April term, 1901, of said court in favor of C. W. Hinckley and J. O. Hinckley, executors, etc., against one Edwin Walker; that thereafter the sheriff of Cook county levied said execution on the lots in question, alleged to be owned by the complainant in the bill, and sold the same on May 7, 1901, at public sale to the appellant, Ida Johnson, for $4800.00; and that a certificate of sale therefor was issued to the appellant and was recorded on May 10, 1901. The certificate of sale, thus issued to appellant, is the alleged cloud upon the title, which is sought to be removed.

This court has held that a freehold is not involved in a proceeding to remove a certificate of sale as a cloud upon title, upon the ground that such certificate does not convey title, nor purport to convey title. Upon its face it only states the amount of the bid at the sale, and when the holder will be entitled to a deed, if the premises are not redeemed. (*Kronenberger* v. *Heinemann*, 190 Ill. 17; *Gage* v. *Busse*, 94 id. 590; *Wilkinson* v. *Gage*, 133 id. 137; *Galbraith* v. *Plasters*, 101 id. 444; *Hutchinson* v. *Howe*, 100 id. 11.) In *Gage* v. *Busse*, *supra*, which was a suit in

chancery to cancel certain tax certificates of sale, and where, as was the case here, the court below granted the relief sought by the bill, it was held that no freehold was involved, although the time for redemption had elapsed at the time the bill was filed. In the case at bar, the time of redemption had not elapsed at the time the bill was filed.

An order will be entered dismissing the appeal, with leave to the appellant to withdraw her record, abstract and briefs, and to the appellees to withdraw their briefs.

Appeal dismissed.

THE CENTRAL STOCK AND GRAIN EXCHANGE

v.

THE BOARD OF TRADE OF THE CITY OF CHICAGO *et al.*

Opinion filed April 16, 1902.

1. BUCKET-SHOPS—*when decision whether complainant keeps a bucket shop is necessary.* Upon a bill to enjoin the defendant telegraph company from refusing to furnish market quotations to the complainant, if the sole defense is that the complainant keeps a bucket shop, the decision of that question is essential to the final disposition of the case, since, aside from any questions of pleading, the chancellor must deny the prayer if it appears to him that the aid of the court is sought to further a violation of law.

2. SAME—*purpose of act of 1897 against bucket-shops.* The object of the act of 1887, (Laws of 1887, p. 96,) to suppress bucket-shops, etc., is to prevent gambling in grain or other commodities, and is directed against the keeper of any place wherein is permitted the buying or selling of grain or produce, on margins or otherwise, without any intention of actual delivery.

3. SAME—*a party conducting business must know that the customers are buying in good faith.* The fact that a party running a grain or produce exchange on market quotations does not inquire of his customers as to their intentions does not shield him from criminal responsibility under the act of 1887, since he must know, or in good faith have reason to believe, the buying and selling are *bona fide* and not within the prohibition of the statute.

4. SAME—*what proof establishes the keeping of bucket-shop.* Evidence that the main part of a party's business is dealing in futures on margins, without any intention of delivering the grain sold or re-

ceiving that purchased, is sufficient to establish the keeping of a bucket-shop such as is prohibited by the act of 1887.

5. SAME—*what does not establish bona fide intention to avoid violation of law.* The fact that a stock and grain exchange requires its customers to sign contracts to receive the commodities purchased does not establish that the purchases were not within the prohibition of the statute, where the evidence also shows that any customer objecting to delivery had no difficulty in settling with the exchange by payment of differences.

6. EVIDENCE—*what not relevant in bucket-shop case.* In an action to enjoin the Chicago Board of Trade and a telegraph company from refusing to furnish complainant with market quotations, evidence that the board of trade conducted its business upon the same plan as that pursued by the complainant is irrelevant.

7. SAME—*effect where a party refuses to testify on ground of privilege.* In a civil action, if a party, upon the ground of privilege, refuses to answer relevant questions or to produce evidence in his possession and control, the presumption is that the testimony, if given, or the evidence, if produced, would be unfavorable to him. (BOGGS, J., does not concur.)

8. INJUNCTION—*when enforcement of rule of board of trade should not be enjoined.* A rule of a board of trade prohibiting its members from executing any orders for customers without a *bona fide* purchase and sale of property for actual delivery is not unreasonable nor in violation of law, and its enforcement should not be enjoined.

Board of Trade v. *Central Stock Exchange*, 98 Ill. App. 212, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. P. VAIL, Judge, presiding.

The following is the statement of the case and the opinion of the Appellate Court made and delivered by Mr. Justice ADAMS:

Statement.—"July 28, 1901, appellee filed a bill against the Board of Trade of the city of Chicago and the Western Union Telegraph Company, alleging that appellee is an Illinois corporation and is engaged in the business of dealing in grain, provisions, produce and other commodities in the city of Chicago; that the Western Union Telegraph Company, which, by arrangement with the board of trade, transmitted to third persons the market

quotations of the board, had, by the request of appellee, so strung its wires as to connect them with appellee's place of business in the city of Chicago and there attached them to instruments placed there by said telegraph company, and by means thereof communicated with appellee and delivered to it said market quotations; that said market quotations are affected with a public interest, and that the successful management of appellee's business depends entirely upon receiving, instantaneously and continuously, the said market reports. The bill avers that the board of trade has threatened to prevent the market reports from being transmitted to appellee, and to withhold from the telegraph company information as to the market quotations and to prevent the transmission to appellee of said quotations. The bill charges that it is the intention of the telegraph company, at the instigation of the board of trade, to cut off and disconnect its wires communicating with appellee's place of business and to remove therefrom the instruments and means of obtaining the market quotations. The bill also avers that the board has forbidden its own members to deal with certain members of the public who are in receipt of certain market information, and who are engaged in the same kind of business as that conducted by members of the board on the floor of its exchange, but in competition with said members, under a penalty of disciplining any of its members who shall violate such regulation, etc.

"On the filing of the bill an injunction was issued, as prayed in the bill, enjoining the Western Union Telegraph Company and the Board of Trade of the city of Chicago from cutting off or disconnecting the telegraph wires from the line or lines of wires or circuits over which the market information of the board of trade has been and is being transmitted to the Central Stock and Grain Exchange at its place of business in Chicago, and from removing therefrom the instruments and appliances

used in connection with said wires, and enjoining the board of trade from doing anything to prevent the Western Union Telegraph Company from gathering such information and market news of transactions on the board and furnishing them to complainant, and from making any contract with any person that will prevent the Western Union Telegraph Company or complainant from receiving said quotations as promptly as any other person, and from doing any act discriminating against complainant respecting the said quotations, and from interfering with or prohibiting any person, firm or corporation, being a member of the board of trade, from doing business with the complainant the same as they do with other persons.

"The Western Union Telegraph Company entered an appearance but filed no answer. July 21, 1900, the board of trade answered, averring, among other things, that appellee is engaged in conducting a bucket-shop, in which it makes with its customers certain pretended contracts respecting the purchase and sale for future delivery of grain and provisions, wherein the parties and the complainant only contemplate that such contracts or trades shall be settled according to the public market quotations of this defendant, without any *bona fide* transaction or contract for actual delivery, and that said pretended contracts or trades are, in reality, but bets upon market prices, and that said market quotations are necessary to enable appellee to conduct said business. The answer further avers that by reason of the giving of the market quotations to bucket-shops by the telegraph companies, it adopted June 25, 1900, certain regulations concerning the distribution of the quotations, which were put in the form of a contract, which contract was submitted to the telegraph companies, including the Western Union company, with a notice that in order to receive the quotations they must sign the same before August 1; that the Western Union company declined to sign said contract, but

the Cleveland Telegraph Company signed it. Attached to the answer and made a part thereof is the contract referred to between the board and the Cleveland Telegraph Company. The contract provides that the board will furnish the market quotations to the telegraph company, and the company agrees as follows: 'Said telegraph company agrees that it will not knowingly furnish or sell, directly or indirectly, said quotations or other news to any other person, firm or corporation conducting a bucket-shop or other similar place where such quotations are used as a basis for bets or other illegal contracts based upon the fluctuations of the price of commodities dealt in on said board of trade; nor will it knowingly continue to furnish such quotations to any person, firm or corporation who shall re-transmit or furnish the same to any person, firm or corporation conducting such bucket-shop or other place, but said telegraph company shall be liable for costs in suits brought to enforce this clause only when it shall actively defend such suit. Said telegraph company agrees that it will not, directly or indirectly, furnish said quotations to any other telegraph company or other person, firm or corporation engaged in the business of distributing market news by telegraph or telephone, the intent hereof being, that every such telegraph company or other disseminator of news shall come into direct contract relation with and accountability to said board of trade as a condition to its being furnished said quotations and news.'

"It is also averred in the answer that the board has established the following rule for the government of its members:

" 'Sec. 8. Any member of the association who shall be interested or associated in business with or who shall act as the representative of, or who shall knowingly execute any order or orders for the account of any organization, firm or individual engaged in the business of dealing in differences on the fluctuations in the market price of any

commodity, without a *bona fide* purchase and sale of property for an actual delivery, shall be deemed guilty of unmercantile conduct which renders him unworthy to be a member of the association, and upon complaint to and conviction thereof by the board of directors he shall be expelled from membership in the association.'

"August 4, 1900, appellee filed a supplemental bill, averring that while a motion for a dissolution of the injunction was pending, counsel for the board of trade offered, in open court, to permit appellee to receive the quotations through the Cleveland Telegraph Company, and that thereupon an order was entered giving appellee leave to file a supplemental bill, and permitting the Western Union company to discontinue the furnishing of quotations and the board of trade to furnish them to the Cleveland Telegraph Company, and the latter company to furnish them to appellee; that since the making of said order the Cleveland Telegraph Company is performing the same service for appellee which was formerly performed for it by the Western Union company, and that all the allegations of the original bill as to the Western Union company are true as to the Cleveland company. Prayer that appellee may have the same relief against the latter company as prayed in the original bill against the former company.

"The board of trade answered, denying that it assented to any arrangement by which appellee was to receive the quotations from the Cleveland company, and averring that since July 31, 1900, appellee has been receiving the quotations from that company in accordance with a contract between it and the company, set up in the answer of the company.

"The Cleveland company answered, setting out the contract of July, 1900, between it and the board of trade, heretofore referred to, and also setting out a contract between it and appellee for the furnishing by it to appellee of the market quotations of the board of trade,

which contract contains the following undertaking of appellee: 'That said party of the second part agrees that its business is and shall be the business of a dealer in grain, produce, stocks, bonds and other commodities; that said party of the second part is not conducting, and will not conduct, a bucket-shop or other business contrary to the criminal laws of the State of Illinois, or use or allow any one else to use said quotations for that purpose.' It is also provided by the contract that (except in a case not here involved) neither party shall terminate the contract without giving to the other party thirty days' written notice of its intention so to do.

"The cause was heard before the chancellor on the testimony of witnesses and other evidence given and produced in open court. The court found, among other things, that defendants have not, nor has any of them, any right to discriminate between persons and corporations engaged in business, and who are ready to pay for the market quotations and to conform to all reasonable regulations as to the collection and transmission thereof. The temporary injunction is made perpetual by the decree and the relief prayed is granted."

Opinion.—"The sole defense set up in the answers is, that appellee is engaged in conducting a bucket-shop,—in other words, that the appellee's business is such as is prohibited by 'An act to suppress bucket-shops and gambling in stocks, bonds, petroleum, cotton, grain, provisions and other produce,' in force July 1, 1897. (1 Starr & Cur. Stat. 1896, p. 1304.) Section 1 of the act provides: 'That it shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept within this State any bucket-shop, office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so

bought or of delivering the property so sold, or wherein is conducted or permitted the pretended buying or selling of such property on margins, or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased or to deliver the same if sold; and the keeping of all such places is hereby prohibited,' etc. Section 2 of the act is as follows: 'It shall not be necessary, in order to commit the offense defined in section 1 of this act, that both the buyer and the seller shall agree to do any of the acts therein prohibited, but the said person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership or person who shall communicate, receive, exhibit or display, in any manner, any such offer to so buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall be deemed an accessory, and upon conviction thereof shall be fined and punished the same as the principal and as provided in section 1 of this act.'

"The Supreme Court, in *Soby* v. *People*, 134 Ill. 66, has in a very careful opinion stated the object of the act and what would be a violation of it. The court say: 'It is manifest that the object of the statute was to suppress and prevent gambling in grain and other commodities.' (Ibid. 71.) Also: 'A consideration of the act will, as before indicated, show that it is directed against the keeping of any office or place, etc., first, wherein is conducted or permitted the pretended buying or selling of grain or other produce, on margins or otherwise, without any intention of receiving the property bought or delivering it if sold. Under this clause of the first section the offense consists in keeping the place, etc., where such buying or selling is conducted or permitted. That plaintiff in error kept the office or place is conceded, and that buying and selling upon margins, without any intention on the part

of the customer to receive the thing bought or to deliver the thing sold, was permitted in such office or place so kept by the plaintiff in error, is also substantially conceded, and if it were not, is abundantly proved. Under this provision of the act the keeper of such office or place, etc., cannot shield himself from criminal responsibility behind the fact that he made no inquiry of his customers. The statute is preventive in its character, and is aimed at the keeping of places where gambling in grain is permitted. The keeper must know that the transaction is not gambling, or, in good faith, have just reason to believe that the buying or selling is not within the intended prohibition of the statute. But if this were not so, there is abundant evidence in this record to show that the plaintiff in error knew that his customers did not contemplate an actual delivery of the commodity bought or sold. Again, the second clause makes it an offense to keep a place, etc., wherein is conducted or permitted the pretended buying or selling of such produce on margins. It is scarcely contended that the customer did not, in fact, intend only to purchase options, and to make money in the rise and fall of the market, without any expectation of receiving or delivering grain. In other words, it is too plain for argument that the buying and selling of grain was a mere pretense,—at least so far as the customer was concerned. Again, the third clause creates the offense where the party buying such produce, or offering to buy the same, does not intend actually to receive the same if purchased or to deliver the same if sold. Here the proof establishes, beyond question, that purchases were made without any intention of receiving the commodity purchased. The only object was to make money on the fluctuations of the market by the pretended purchase of the grain on margins.'

"The evidence in the case is very voluminous. The evidence for the appellants, on whom the court held the burden of proof rested, was mainly directed to proving

that the appellee kept a bucket-shop, within the meaning of the statute; that the dealing at appellee's place of business was solely on the market quotations of the Chicago Board of Trade, and that it knowingly permitted the pretended buying and selling by its customers of grain with reference to such market quotations, and without any intention of receiving the grain ostensibly bought or delivering that ostensibly sold, their only intention being to make money by the rise or fall of the market, as the case might be. Appellee's evidence was mainly directed to proving that a large part of the business of the Board of Trade of the city of Chicago was similar to that of appellee, namely, that grain was bought and sold on the exchange of the board on margins or stop orders, without any intention to deliver the grain, and, incidentally, that there were some deliveries by and to appellee. The evidence shows clearly that the main part of appellee's business was dealing in futures on margins, without any intention of delivering the grain sold or receiving that purchased by it, and that it kept a bucket-shop, within the meaning of the statute, and used the market quotations in its bucket-shop business.

"Appellee's counsel, in their argument, admit that 'actual deliveries and receipts of commodities were not a large percentage of the business transacted,' and this admission is fully sustained by the evidence. It appears that there were some deliveries of grain, but such were exceptional and insignificant in comparison with the bulk of appellee's business. It also appears from the evidence that appellee sent out delivery notices, and in some cases required persons to sign a contract to receive, but when the person receiving such notice or signing such contract objected to delivery, he had no difficulty in settling his trade with appellee by paying or receiving, as the case might be, the difference between the price at which the grain was bought or sold and the price at which the trade was closed by stop order or exhaust of margin.

"The requiring a party who purchased or sold to sign a contract to accept or make delivery is an unusual circumstance and not at all necessary in a *bona fide* transaction, the law in such case being, that the party selling is bound to deliver and the party purchasing is bound to accept delivery. Therefore, the purpose of such a contract must have been something other than the securing of a legal right. Stockton, witness for defendant, testified that McHie, appellee's president, told him that the trades must be based on actual delivery, and that he (witness) would have to sign an agreement to that effect, which he did, but that after he made the agreement, although he sometimes made trades with appellee of 50,000 or 100,000 bushels of grain in a day, he never received from or delivered to appellee one bushel of grain and never saw a warehouse receipt in any transaction he had with appellee. It also appears from the evidence that one of appellee's rules was, that if one of its correspondents sent an order by telegraph, the telegram should not contain a stop order, but if a stop order were intended it must be sent by a second telegram. This, we think, was evidently for the purpose of preventing the original order from apparently showing that the proposed deal was purely speculative. In *Soby* v. *People*, *supra*, the court say: 'We are of opinion that it is no longer possible in this State, under any shift or device, however specious, to keep an office or other place where parties may, under the pretense of buying or selling grain or other produce, engage in speculation in futures and gamble upon the rise and fall of the market,' etc.

"The court ruled appellee to produce telegrams received in its business since July 1, 1901, which it declined to do on the claim of constitutional privilege, which claim was allowed. The witness Sanderson, clerk of appellee, testifies that he had, as such clerk, recorded on certain sheets trades made with appellee, and appellants moved for a rule on appellee to produce the sheets,

which motion appellee resisted on the same claim of privilege, and the claim was allowed. A number of the witnesses, some of them officers of appellee, refused to answer questions relevant to the issues, on the like claim of privilege. When a party refuses to answer relevant questions or to produce evidence in his possession or subject to his control, the presumption is that the testimony, if given, or the evidence, if produced, would be unfavorable to him. (1 Jones on Evidence, sec. 17.) Although such refusal, if based on the ground that the evidence might tend to criminate the party, could not be used against him in a criminal prosecution, we are inclined to the view that in a civil case the general rule as above stated is applicable. Evidence produced by the appellee tending to prove that a large part of the transactions between members of the board of trade is on futures and purely speculative, and not different in kind from that done by appellee, is irrelevant. Appellee is seeking relief—not the board of trade nor any member of the board.

"It is certified by the learned judge who tried the cause that 'it was not necessary to a final disposition of said cause to determine whether or not the complainant kept a bucket-shop,' and that such was his view is evidenced by the decree, and also by his opinion, a copy of which is filed in the cause here. We are committed to the opposite view. (*Christie-Street Commission Co.* v. *Board of Trade*, 94 Ill. App. 229.) That was a case similar to the present, in which the appellant, complainant in the lower court, prayed an injunction to restrain the defendants from refusing to furnish the complainant with the market quotations, and the defense in that case, as in this, was that the complainant was keeping a bucket-shop and wanted the market quotations for use in that business. In that case we said: 'But aside from any question of pleading, we are of opinion that when it appeared to the chancellor that the aid of the court was

sought to enable the complainant (appellant) to carry on an enterprise which was prohibited by the law, the chancellor could not do otherwise than deny the prayer. If it is not within the scope of chancery jurisdiction to punish or prevent crimes at the instance of private suitors, it is surely quite as far removed from the scope of equity to assist the law-breaker in his violation of the statute.'

"The injunction in the present case not only enjoins the appellant from refusing to furnish to appellee the market quotations, but it enjoins the board of trade from enforcing the rule (section 8) copied in the statement preceding this opinion. The temporary injunction enjoined the appellants from 'prohibiting any person, firm or corporation, being a member of the board of trade, from doing business with the complainant, the same as they do with other persons.' The temporary injunction is made perpetual by the final decree. We are of opinion that the rule, enforcement of which is enjoined by the decree, does not infringe public policy or any rule of law and that it is not unreasonable. Such being the case, it was error to enjoin its enforcement. In *Board of Trade* v. *Riordan*, 94 Ill. App. 298, we reversed a decree enjoining the board of trade from trying a member of the board charged with a violation of the rule in question, citing numerous decisions.

"The decree will be reversed."

JACOB J. KERN, CHARLES D. FULLEN, and JOHN A. BROWN, for appellant.

HENRY S. ROBBINS, for appellees.

Per CURIAM: The foregoing opinion of the Appellate Court, from which we have omitted details of the evidence, meets with our full approval, as making a just and proper disposition of the case on the record, and it will be adopted as the opinion of the court. It clearly

appears that the quotations of market prices which appellant sought by its bill to compel appellees to continue to furnish, were used, and were obtained for the purpose of being used, in conducting a business in violation of law as well as of its contract with the telegraph company. Appellant was not entitled to any relief of that character. In this respect the case differs materially from *New York and Chicago Grain Exchange* v. *Board of Trade*, 127 Ill. 153.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Mr. JUSTICE BOGGS: I concur in the judgment of affirmance herein. I, however, doubt the soundness of the proposition that if the privilege given by law to decline to answer a question is availed of, a presumption having probative force as evidence arises that the answer would have been unfavorable. Mr. Greenleaf, in his work on Evidence, (vol. 1, 15th ed. p. 600,) says: "If the witness declines to answer, no inference of the truth of the fact is permitted to be drawn from that circumstance." In notes 10 and *f* to the text a number of authorities are cited in support of the conclusion announced by the learned author.

There is authority for the view that if a party to a civil action voluntarily becomes a witness in his own behalf and in the course of his examination claims his privilege to refuse to answer a material and, aside from the privilege, a competent question, the circumstance may be considered and given the like effect as a refusal to produce the evidence which it is in his power to produce. (*Andrews* v. *Fry*, 104 Mass. 234.) But I think the weight of authority is against the position that an adverse party may be called to take the stand as a witness in behalf of his adversary, and his declination to answer a question which he has a legal right to refuse to answer be seized upon as proof of the truth of a supposed fact which it might be implied an answer to the question would disclose.

THE CHICAGO CITY RAILWAY COMPANY
v.
JOHN TUOHY.

Opinion filed April 16, 1902—Rehearing denied June 4, 1902.

1. STREET RAILWAYS—*greater care is required at street crossings than elsewhere.* Those in charge of a street car must exercise a greater degree of care and watchfulness at street intersections than at other places along the route, and should notice whether the track is clear as they approach, and sound the gong in warning.

2. SAME—*electric cars should not be run at speed incompatible with use of highway by others.* Electric cars cannot lawfully be run at a rate of speed which is incompatible with the lawful and customary use of the street or highway by others.

3. SAME—*it is a question of fact whether motorman keeps such a lookout as circumstances demand.* It is a question of fact for the jury whether a motorman keeps such a lookout as the circumstances demand, or gives such warning of approach as is necessary when he discovers that a child is upon the track or approaching it, and the fact that the car runs an unusual distance before it stops is some evidence of improper management.

4. SAME—*motorman should use high degree of care to prevent injuring child.* If a young child is discovered approaching the track with the apparent intention of crossing in front of a moving car, or is discovered on the track, it is the duty of the motorman to use a high degree of care to prevent injuring him.

5. SAME—*what sufficient to go to jury on question of company's negligence.* Evidence that the plaintiff, a child of tender years, was backing from the sidewalk to the car track talking to a companion, and in full view of the motorman on a car approaching the crossing at a high rate of speed without giving warning of its approach, is sufficient to warrant a submission of the case to the jury. (*Rack* v. *Chicago City Railway Co.* 173 Ill. 289, distinguished.)

6. INFANTS—*child under seven years of age is not chargeable with contributory negligence.* Up to the age of seven years a child is incapable of such conduct as will constitute contributory negligence, and the court may so declare, as a matter of law, in its instructions.

7. SAME—*alleged admission of young child should be received with great caution.* Alleged admissions of a child of tender years as to the manner in which he received his injury should be received with greater caution than admissions of adults, and the jury should weigh them with reference to his age and understanding.

Chicago City Railway Co. v. *Tuohy*, 95 Ill. App. 314, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

This is an action on the case, begun on February 24, 1896, by the appellee against the appellant company to recover damages for a personal injury. The trial in the circuit court resulted in verdict and judgment in favor of appellee. This judgment has been affirmed by the Appellate Court. The present appeal is prosecuted from such judgment of affirmance.

The appellee, a boy between five and six years of age, was on April 17, 1895, struck by one of the electric cars of the appellant company on Thirty-fifth street in the city of Chicago, near the corner of Wood street. The car ran over the appellee and crushed his leg in such a way that it had to be amputated at a point about one-third below the knee. Thirty-fifth street runs east and west, and Wood street runs north and south. When the injury occurred, the car, which struck the appellee, was coming from the west and going east on Thirty-fifth street. The evidence tends to show, that the injury occurred about twenty feet east of the crossing or intersection of Wood street with Thirty-fifth street. The next street west of Wood street, running north and south, which crosses Thirty-fifth street, is Honore street, and the next street west of Honore street, running north and south, which crosses Thirty-fifth street, is Lincoln street. The next street east of Wood street, running north and south, and which crosses Thirty-fifth street, is Hermitage avenue.

WILLIAM J. HYNES, SAMUEL S. PAGE, and WATSON J. FERRY, (MASON B. STARRING, of counsel,) for appellant.

ALTGELD, DARROW & THOMPSON, and P. A. HINES, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—At the close of the evidence of appellee, the plaintiff below, the appellant, defendant below, asked the court to give the jury a written instruction to return a verdict of not guilty. This instruction was refused, and exception was taken to such refusal. At the close of all the testimony in the case, the defendant below again presented to the court a written instruction directing the jury to return a verdict of not guilty, and asked the court to give such instruction. The court refused to do so, and exception was taken to such refusal. The question is thus raised whether or not the evidence justified the court in submitting the case to the jury. Where the evidence before the jury, with all the inferences proper to be drawn therefrom, tends to prove the cause of action set out in the declaration, the court should not peremptorily direct the jury to return a verdict of not guilty. (*Union Bridge Co.* v. *Teehan*, 190 Ill. 374).

The cars of the appellant upon Thirty-fifth street were propelled by electricity by means of electric wires strung overhead, and were known as trolly cars. There were two tracks laid in Thirty-fifth street, the cars going east running upon the south track, and the cars going west running upon the north track. The car, which inflicted the injury, had stopped at Lincoln street, two blocks west of Wood street, to take on a passenger, but after that did not stop until it passed beyond Wood street to the point where the appellee was injured. Just before the accident the appellee was standing in company with another boy eleven years old, named Thomas Bonner, near the intersection of Wood street and Thirty-fifth street on the south side of Thirty-fifth street, and near the corner made by the intersection therewith of Wood street. The sidewalk was about fourteen feet wide between the curb and the building line of the houses fronting upon the street.

The space between the curb at the edge of the sidewalk and the south rail of appellant's south track was about twelve feet. At that time appellee lived with his father and mother on Thirty-fourth court near the corner of an alley west of Wood street, and not much farther than a block or a block and a half from where the accident occurred. The boy, Thomas Bonner, lived with his father on Wood street about a block and a half from where the appellee lived. Frank Bonner, the father of Thomas Bonner, was a lamp-lighter in the employ of Michael J. Tuohy, appellee's father. The accident occurred about five o'clock in the afternoon. There was a lamp-post about eighty-two feet east from the south-east corner of Wood and Thirty-fifth streets. Frank Bonner had sent his son, the boy Thomas Bonner, to the house of appellee's father to get a filler of oil for the purpose of filling some of the street lamps. Upon going to the house of appellee's father to get the oil, appellee asked permission to accompany Thomas Bonner, and his mother permitted him to do so. They went south and crossed the tracks, and stood near the corner of Wood and Thirty-fifth streets on the south side of Thirty-fifth street while Frank Bonner, the father, was lighting the lamp, distant eighty-two feet from the corner, or thereabouts. Frank Bonner had requested the boys to stand at the corner until he finished lighting the lamp. There is testimony in the record, tending to prove that the car, which caused the injury, was traveling at an unusually high rate of speed, that is to say, from fourteen to sixteen miles an hour, according to the testimony of some of the witnesses. There is also evidence, tending to show that no bell was rung or gong sounded upon the approach of the car to the street crossing.

It is incumbent upon those in control of a street car to exercise a greater degree of care or watchfulness at street intersections than at other places along the route. (Booth on Street Railways, sec. 306; *West Chicago Street*

Railroad Co. v. *McCallum*, 169 Ill. 240; *Chicago City Railway Co.* v. *Robinson*, 127 id. 9). Drivers, gripmen and motormen of street cars are obliged at all times to exercise reasonable care in the conduct of their cars, but the requirement of reasonable care imposes upon them a more exacting attention when they approach street crossings in a crowded city where vehicles and pedestrians may always be expected in front of them. "The failure under such circumstances to ring the bell, sound the gong, or give other proper warning * * * is undoubtedly evidence of negligence to be submitted to a jury under all the circumstances," whether there is an ordinance requiring such precautions or not. The increase of danger to the public at such crossings demands a corresponding increase of vigilance and energy on the part of such drivers, gripmen and motormen. They ought to notice whether or not the track is clear when they approach such public crossings, and sound the gong as warning. (2 Thompson on the Law of Negligence, secs. 1399-1401).

Counsel for appellant insist that the appellee was not at the crossing. While this may be strictly and technically a correct statement of the facts, yet the evidence tends to show that the appellee was struck only about twenty feet east of the crossing, and so near thereto as to have required a slackening of the speed of the car. The evidence tends to show that the boys had been instructed by the father of one of them to stand at the corner until he had finished lighting his lamp, and, while they may have moved a short distance east of the corner, they were near enough thereto to demand of the appellant the exercise of the care required in propelling its cars across a street crossing.

Even, however, if the party injured was not sufficiently near the crossing to justify the application of the increased vigilance required of a street car company in approaching a crossing, yet there is evidence tending to show that the speed of the train was unreasonable and

dangerous. Street cars propelled by electricity cannot be lawfully run at a rate of speed which is incompatible with the lawful and customary use of the highway by others. Here, the appellee had as much right to be upon the street as the appellant. (2 Thompson on the Law of Negligence, sec. 1395). A street railway company has no property interest in the street, and, therefore, no right to run its cars at a rate of speed which will interfere with the customary use of the street by others of the public with safety. Such cars can be more readily and quickly stopped than the train of an ordinary railroad. Where the motorman or gripman runs his car at such a rate of speed that he is prevented from keeping control of it, so as to stop it within a reasonable distance upon an appearance of danger to others, the rate of speed, at which he propels the car, is to be deemed unreasonable or dangerous. It has been held that, where an electric car was running at the rate of ten or eleven miles an hour over a crossing in a much frequented street without giving any signal, there was such evidence of negligence as justified a submission of the case to a jury. (2 Thompson on the Law of Negligence, secs. 1395-1397).

The evidence in the case tends to show that, when Frank Bonner had finished lighting the lamp and came down from the ladder, the appellee, with his face towards the track, stepped down from the curbing at the edge of the sidewalk to the street, and then turned around, and while backing towards the north-west and towards the south track, he talked with the other boy standing upon the sidewalk or curb with his oil can. While he was thus backing towards the track, the train was coming at an unusually high rate of speed. The boy, Thomas Bonner, says that the appellee had reached the south rail of the track and had his foot over it when he, the witness, discovered that the train was about to strike the appellee. Thomas Bonner then says that he hallooed to appellee to look out, and went forward to pull him away from the

car; that the car was within fifteen feet of the appellee before witness saw the car; that he did not see the car until it had advanced about five feet beyond the crossing. He also says that, when he called to appellee to look out, and advanced towards him, appellee tried to cross the rail and come back, but was struck before he succeeded in doing so. The evidence also tends to show that, when the car stopped, it had probably passed the boy by about seventy-five feet.

It is a question of fact for the jury whether the gripman or motorman on such a car keeps such a lookout as the circumstances demand, or gives such warning of approach as is necessary when he discovers that a child is upon the car track or approaching it; and the circumstance, that the car has run an unusual distance before it stops, is some evidence of improper management. (*Roberts* v. *Spokane Street Railway Co.* 54 L. R. A. 190.) When a young child is discovered approaching the car track with the apparent intention of crossing in front of a moving car, or is discovered on the track, it is certainly the duty of the gripman or motorman to exercise a high degree of diligence in order to prevent injury to the child. (2 Thompson on the Law of Negligence, sec. 1424; *San Antonio Street Railway Co.* v. *Mechler*, 87 Tex. 628). A verdict in favor of the plaintiff will not be disturbed, where it appears that a street car approaches a street crossing at a very fast rate of speed without any alarm while a boy is standing on the track in full view of the motorman, or standing in the center of the track with his back towards the car. (2 Thompson on the Law of Negligence, sec. 1425).

In the case of *Rack* v. *Chicago City Railway Co.* 173 Ill. 289, it appeared that the boy there injured was standing in the roadway, and not, as here, approaching the car with his back towards it. It also appeared in the *Rack case* that the gong was rung while the train was passing over the crossing. In that case, there was no testimony

tending to contradict the gripman in reference to the circumstances there referred to. In the case at bar, however, there was not only evidence tending to show that the appellee was approaching the car, and that, too, with his back turned towards it, but there was also evidence, tending to show that no bell was rung or other warning given to the appellee of the approach of the car. In these respects the *Rack case* is distinguishable from the case at bar.

After Frank Bonner had lighted the lamp and descended by means of his ladder, he stood upon the sidewalk talking with a man, named Gillen. He and his son, Thomas Bonner, and Gillen were witnesses of the accident and testified to what they saw in behalf of appellee. The only witness on behalf of the appellant, who saw the accident, was the motorman, whose deposition was taken in a distant State and read upon the trial. Appellant sought upon the trial to discredit the testimony of the appellee's witnesses by introducing evidence, tending to show that such witnesses had made different statements in regard to the facts from those testified to upon the trial. It appears that, a day or two after the accident, the appellant sent parties to appellee's witnesses to interview them, and at a subsequent day procured the attendance of these witnesses at the office of appellant's attorney, and took down their statements. Upon the latter occasion, it would appear that such statements were taken down, so far as they were taken down at all, by a stenographer. But upon the occasion immediately following the accident, no stenographer was present, but two representatives of the company were present, one of them asking questions in the presence of the other. The questioner made notes of the answers, and, when he returned to his office, he dictated these notes to a shorthand reporter, and he and his companion then signed the reporter's notes. The statements thus alleged to have been made by the plaintiff's witnesses were proven, and

sought to be proven upon the trial, as contradictory of their testimony. Whether or not the witnesses were contradicted in this way was a matter for the jury to determine. The jury were the judges of the credibility of the witnesses.

It is true that the witnesses, introduced by the appellant, contradicted the witnesses introduced by appellee. The evidence of appellant tended to show that the car was not proceeding at an unusual rate of speed, and that the gong was sounded and due warning given, and that the appellee attempted to run across the track as the train was approaching, with his face towards the track. Whether the witnesses of appellant were more worthy of credit than those of appellee was a matter for the jury to decide. So far as we are concerned, the judgments of the circuit and Appellate Courts are conclusive upon the questions of fact. If the jury believed that the car, which injured appellee, was proceeding across Wood street at its intersection with Thirty-fifth street at an unreasonable and dangerous rate of speed, and without giving any signal of warning to those crossing the street at that point, and if the jury further believed that, under all the circumstances, the motorman saw, or ought to have seen, the appellee approaching the track, and, if he had kept a proper lookout, could have avoided striking him, then the verdict of the jury was correct. All that we decide upon this branch of the case is, that there was testimony enough tending to show negligence on the part of the appellant company to justify the submission of the matter to the jury.

Second—Appellant complains that the trial court erred in the giving and refusal of certain instructions. The second instruction, given for the appellee, is complained of by the appellant, and is as follows:

"The court further instructs the jury that, if they believe from the evidence that the plaintiff at the time of the accident was a child between the age of five and six

years, then he cannot, because of his tender years, be guilty of, or be charged with, carelessness or negligence in respect to the accident in this case, so as to relieve at all any want of due care on the part of the railroad company, so that, if the jury further believe from the evidence that the accident causing the injury to plaintiff was due to the want of due and ordinary care by the defendant railroad, then you must find a verdict for the plaintiff, and no want of care by the plaintiff will save the defendant from liability for the accident."

The instruction, numbered 24 given by the court for appellant, told the jury that the burden was upon the plaintiff, appellee here, "to prove that he was exercising due care for his own safety at the time of the alleged injury." Instruction numbered 46 given for the appellant, as modified by the court, told the jury that the plaintiff could not recover at all unless he established by a preponderance of all the evidence "either that the plaintiff was too young to be charged with carelessness under these instructions, or else that the plaintiff did not in any way contribute to the injury by any want of ordinary care, prudence, vigilance and caution for his own safety or to avoid the accident on the occasion in question." By instruction numbered 47, as modified and given for the appellant, the court told the jury that the plaintiff must prove by a preponderance of all the evidence in the case that he "at the time in question was too young to be charged with carelessness under these instructions, or that he was in the exercise of due care, caution, prudence and vigilance for his own safety." The instructions upon this subject, thus given for the appellee and for the appellant were, to a certain extent, contradictory of each other. Instruction numbered 2 given for the appellee told the jury in substance that the appellee could not be charged with negligence because of his tender years, while the instructions given for the appellant told the jury that the appellee was chargeable with ordinary

care for his own safety. This contradiction, however, could have done appellant no harm if the second instruction given for appellee was correct, or harmless. The other instructions were in appellant's favor.

It is a general rule of law, that children of tender years are not deemed, in law, imputable with contributory negligence. This rule is based upon the fact that they are not capable of care. But at what age children are to be deemed *sui juris*, so as to be capable of contributory negligence, and at what age they are to be deemed *non sui juris* so as to be incapable of contributory negligence, is a question of much difficulty and about which the authorities are strangely in conflict. If a child is of such tender years that he is conclusively presumed incapable of judgment and discretion and of owing duty to another, contributory negligence on his part cannot be set up to defeat recovery. At what age is a child to be considered of such tender years that this conclusive presumption arises? In the case at bar, the proof shows that the accident occurred on April 17, 1895, and that the appellee became six years of age on the second day of June following, so that he lacked six weeks of being six years of age when he was injured.

In *Chicago City Railway Co.* v. *Wilcox*, 138 Ill. 370, where the child injured was only six years of age, the court gave to the jury an instruction that negligence could not be imputed to him on account of his age. In that case we said (p. 382): "The application of the doctrine of contributory negligence to the conduct of young children is a difficult one, and very naturally had led to a considerable difference of opinion. The two opposing views most commonly met with are, first, that up to a certain age, the precise limit of which is not and perhaps cannot be well defined, a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law. The rule thus contended for is sometimes said to be analogous to the rule of the

common law which exempts children under seven years of age from criminal responsibility. It has accordingly been held that children of eighteen months, of two years, of two years and ten months, of four years, under five years, of five years, of six years, under seven years, and even seven years of age, are incapable of such negligence. (Bishop's Non-Contract Law, sec. 586, and authorities cited.) This rule seems to have been recognized in this State with more or less distinctness in the following cases." Seven cases decided by this court are then referred to.

In *Chicago City Railway Co.* v. *Wilcox*, *supra*, the court proceeds further to say: "The other view is, that young children are bound to use such care and such care only as is usually exercised by children of the same age and degree of intelligence, and that it is always therefore a question of fact to be determined by the jury whether, in a given case, the child is in the exercise of proper care, his tender years, his intelligence or the want of it, and all the circumstances by which he was surrounded being taken into account. Under this rule, as is claimed, it can never be laid down as a matter of law, that any child, however young, is incapable of contributory negligence, it being always a question of fact for the jury. The following cases are referred to as giving some support to this rule." The court then refers to four cases decided by this court.

In *Chicago City Railway Co.* v. *Wilcox*, *supra*, it was not determined which of the two rules above mentioned should be adopted, but the court held, for certain reasons there set forth, that the instruction given, even if it embodied an incorrect proposition of law, could not have materially prejudiced the party complaining of it, and therefore the judgment in favor of Wilcox was not disturbed. It was there said (p. 385): "Whether the instruction then was or was not correct in holding that, on account of the plaintiff's tender age, negligence could

not be attributed to him, it manifestly did no harm, as the jury could not have found otherwise than they did on that question if the instruction had not been given, or if the contributory negligence of the plaintiff had been submitted to them as a question of fact."

We are of the opinion upon further consideration that, where the testimony shows that a child is only six years old or less, he is incapable of such conduct as will constitute contributory negligence. In other words, a child of the age of only six years or under is exempt from responsibility in the matter of contributory negligence, and so far as the exercise of due care for his own safety is concerned.

In *Chicago and Alton Railroad Co.* v. *Gregory*, 58 Ill. 226, the child injured was not quite five years old, and it was held that negligence could not be imputed to a child of such tender years. In *City of Chicago* v. *Hesing*, 83 Ill. 204, the child was less than four years old, and it was there held that he was too young to observe any care for his personal safety. In *Chicago and Alton Railroad Co.* v. *Becker*, 84 Ill. 483, the child was between six and seven years of age, and it was there said that a general rule as to negligence "cannot be applied to a case where the person injured is an infant of such tender age that the requisite capacity to exercise proper care and discretion is wanting. While the deceased was, no doubt, possessed of ordinary intelligence, and was as capable of using as much caution for his safety as other boys of his age, yet it is not to be expected of a boy between six and seven years of age, that the same caution and care will be used, for personal safety, as will be exercised by a person of mature age, and the law will not impute negligence to an infant of such tender years. * * * We are, therefore, of opinion * * * that the deceased could not be required to use as much care and caution as one older in years, and hence negligence was not to be imputed to him." In *Gavin* v. *City of Chicago*, 97 Ill. 66, the plaintiff

was only four years old, and we there said, "of course he was too young to exercise any care for his personal safety." In *Toledo, Wabash and Western Railway Co.* v. *Grable*, 88 Ill. 441, we said: "The intestate, at the time of her death, was only twenty-eight months old and of course she was too young to exercise any care for her personal safety." In *Chicago, St. Louis and Pittsburg Railroad Co.* v. *Welsh*, 118 Ill. 572, the plaintiff injured was at the time of the happening of the accident seven years and three months old, and we there said: "It is obvious, plaintiff was too young, at the time she was injured, to observe any care for her personal safety." In *Chicago West Division Railway Co.* v. *Ryan*, 131 Ill. 474, where the child injured was not quite seventeen months old, we said: "The child was so young, that it was incapable of exercising care, and cannot be charged with negligence."

In view of the authorities in our own State which are quoted as above, we are certainly justified in holding the proposition hereinbefore stated to be correct, namely, that a child only six years old or under is incapable of exercising care for his own safety, so that negligence cannot be imputed to him. The case of *Chicago and Alton Railroad Co.* v. *Becker*, 76 Ill. 25, is referred to as holding a contrary doctrine, but in that very case, which came before us a second time and is reported as *Chicago and Alton Railroad Co.* v. *Becker*, 84 Ill. 483, we said that a boy between six and seven years of age was of such tender age that the law would not impute negligence to him. The case of *Chicago and Alton Railroad Co.* v. *Murray*, 62 Ill. 326, is also referred to in support of the contention of appellant, but in that case the child injured was seven and one-half years old. In *Kerr* v. *Forgue*, 54 Ill. 482, the child injured was about twelve years old. In *Chicago, Rock Island and Pacific Railway Co.* v. *Eininger*, 114 Ill. 79, there was no evidence as to the age of the child injured, it being there expressly said: "There was no evidence as to the age or capacity or discretion of the

plaintiff introduced, more than that witnesses spoke of him as a little boy."

The doctrine, that negligence cannot be imputed to a child six years old and under, is supported by other than Illinois authorities. In *Walbridge* v. *Railway Co.* 190 Pa. St. 274, the child injured was only six years of age, and in that case the Supreme Court of Pennsylvania say: "Our consideration of the testimony has led us to the conclusion that the case could not have been thus withdrawn from the jury. There was sufficient evidence to carry the case to them on the question of defendant company's negligence, and that was the only question of fact in the case, aside from the amount of damages that should be awarded in case it was determined that the injury was the result of defendant's negligence. The question of contributory negligence was not in the case, because the plaintiff was only six years of age at the time he was injured." In the latter case, the company, against whom the suit was brought, was the Schuylkill Electric Railway Company, and the court further say: "It might be fairly inferred from the testimony that the car was running at an unusual and excessive rate of speed, that no gong was sounded or other warning given, and that the car could have been stopped in ample time to prevent the accident, if proper caution had been taken. Such inferences from proved facts were for the jury, and not for the court, and the case was rightly submitted to them."

In *Mackey* v. *City of Vicksburg*, 64 Miss. 779, the action was brought by an infant of six years to recover damages for an injury, and the court there say: "It cannot be inferred, as matter of law, that the plaintiff, an infant of six years, could be guilty of contributory negligence. * * * There is certainly no presumption of law that an infant of his age is capable of even the slight degree of care and prudence, the absence of which in an adult would be the grossest negligence."

In *Central Trust Co.* v. *Wabash, St. Louis and Pacific Railway Co.* 31 Fed. Rep. 246, which was a claim in behalf of a boy about six years old, whose foot had been crushed in such a way as to necessitate amputation, the court say: "The boy being only six years old, no negligence can be imputed to him. Therefore, the issue of contributory negligence is not in the case." In *Gunn* v. *Ohio River Railroad Co.* 42 W. Va. 676, two little boys, Henry C. Mayes not quite five years old, and Luelza Mayes, about six years old, were killed by a train on the Ohio River railroad, and a suit was brought by the administrator of Henry C. Mayes against the railroad company to recover damages for his death; and it was there said: "If Henry C. Mayes had been an adult, no recovery could be had for his death, as he met his sad and early death on the railroad track, and the defense of contributory negligence would defeat recovery, but a child of the tender years of this child is not chargeable with contributory negligence for want of judgment, discretion and presence of mind to know and avoid danger." (*Dicken* v. *Liverpool Salt and Coal Co.* 41 W. Va. 518; *Erie Passenger Railway Co.* v. *Schuster*, 113 Pa. St. 415; *Summers* v. *Brewing Co.* 143 id. 115; 1 Thompson on the Law of Negligence, sec. 310, and cases cited in note 95.)

In the present case, however, there was no evidence tending to show that the appellee was a boy of sufficient intelligence or capacity to exercise any care for his own safety. The proof shows, that he lived only a block and a half from the house of his little friend, Thomas Bonner, eleven years old, and the son of his father's employe, Frank Bonner. His mother swears that she never allowed him to go alone to the house of Frank Bonner, only a block and a half distant. Appellant relies upon the fact, that he was allowed to go to school at a public school at the corner of Lincoln and Thirty-fifth streets. His mother says that he had been in the habit of going to that school

for more than a month, and, in order to reach the school, it was necessary for him to cross the tracks. It appears, however, that the school was only a short distance from his home, not more than about two blocks distant. His mother says, when asked: "This school you speak of was how many blocks from your house?" Ans. "I should think it was a block and a half." The proof does not show conclusively that the boy went to school alone. He had a sister older than himself. Whether she accompanied him to and from school does not appear, but it does appear that he was not allowed to go alone to the house of Thomas Bonner, and it is a natural inference that he was not permitted to go to and from school alone. It appears from the evidence, that the cars of the appellant ran by the school house in question where the appellee attended school, and which was at the corner of Lincoln and Thirty-fifth streets. The law demands "greater care and vigilance in running an electric car over a public street crossing, which is much frequented by children going to and returning from school, at a time when they may reasonably be expected to be using the crossing, than is demanded at other places." (2 Thompson on the Law of Negligence, sec. 1424; *Wallace* v. *Railway Co.* 26 Ore. 174). The presumption is that, in passing the school in question, the cars of the appellant obeyed the law which demands greater care in view of the crossing of the street at that point by children going to school. It does not follow, therefore, that, in going to this school every day, which was so short a distance from his home, the boy was running the same dangerous risk as he would run in crossing the track at any other point. He was protected by the fact that other children passed to and fro with him over the tracks in going to and from school. Appellant lays stress upon the case of *Chicago, Rock Island and Pacific Railway Co.* v. *Eininger*, *supra*, where it appeared that the boy, who was injured, was permitted by his parents to attend school. But, there, it is stated that

the school was "at a considerable distance from home," while here the school was only a block and a half or two blocks from the home of the appellee. Moreover, the boy in the *Eininger case* was upon the private right of way of a steam railroad company, and was charged by the company with attempting wrongfully to climb upon the train. It not appearing what the age of the boy Eininger was, so far as is shown to the contrary he may have been much older than six years. Hence, that case has no application. We are of the opinion that there was no error in giving the second instruction, and hold, in analogy to the rule of the common law, which exempts children under seven years of age from criminal responsibility, that up to the age of seven years "a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law." (*Chicago City Railway Co.* v. *Wilcox*, *supra*). The rule has its basis in the well known immaturity of a child of such tender years.

But, even if the second instruction given for the appellee was incorrect, it may be said here, as it was said in the case of *Chicago City Railway Co.* v. *Wilcox*, *supra*, that the instruction did no harm, as the jury could not have found otherwise than they did if the instruction had not been given. There is no evidence to show that appellee did not exercise such care and caution as might be expected of a boy of his age, or that he was guilty of any negligence such as could be charged to a boy of his age. Even Thomas Bonner, who was eleven years old, did not know of the approach of the train or hear it coming until it had passed five feet beyond the crossing, and there is nothing to show that the appellee saw the train, or that it was in any way brought to his attention before it struck him. Therefore, we agree with the Appellate Court when they say, in their opinion deciding this case, "that it does not affirmatively appear from the evidence that appellee was not in the exercise of such care as is

usually exercised by, and might be expected from, children of the same age and degree of intelligence, and the jury would not have been warranted in so finding had the question been expressly submitted to them. The instruction complained of was not at least harmful in that respect."

Third—Appellant complains of the third instruction given by the court for appellee, which is as follows:

"The court further instructs the jury that a street railroad company, while using the highway, must have due regard for the safety of others and use every reasonable effort to avoid injury to others."

It is insisted that by this instruction the jury were informed that, in using the highway, appellant was bound to do all that human skill, care, vigilance and foresight reasonably could do. We do not think that the instruction is capable of any such construction. The instruction merely required the appellant to use ordinary care to avoid injury to others. The word "every" does not mean that the company should use all possible effort to avoid injury to others. The use of the word "reasonable" makes such a construction unnatural. Although the language used in the instruction may not have been wisely selected, yet any apparent defect in it was cured and remedied by other instructions which were given. By the fourteenth instruction given for the appellant, the court instructed the jury "that the motorman in question, on the occasion in question, was not bound to use the highest degree of care and caution possible to avoid injuring children or other persons upon the street or approaching or crossing the tracks where the defendant was running its cars, but he was, in law, only required to use ordinary and reasonable care, under all the circumstances, to avoid such injury." Other instructions, given for appellant, told the jury that the motorman was only obliged to exercise reasonable and ordinary diligence and care to avoid injury to the plaintiff. Inasmuch as any obscurity in the ex-

pressions used in the instruction complained of was thus explained and cured, the instruction cannot be regarded as sufficiently erroneous to make the giving of it a ground for a reversal of the judgment.

Fourth—Complaint is also made of the sixth instruction, given on behalf of appellee, which reads as follows:

"The jury are instructed that, in considering the credibility of witnesses and in determining the worth of their testimony, they can take into consideration the fact that a witness is in the employ of defendant railroad company, and also his connection, if any, with the accident causing the injury complained of, taking the same in connection with all the other evidence in this case."

The charge, made against this instruction, is that it singles out the employes of defendant who are witnesses, and directs the special attention of the jury to their testimony. The instructions, given on both sides, are to be considered all together and as one charge. The sixth instruction, given for appellee, must be read in connection with instruction numbered 34, given for appellant, which is as follows:

"The court instructs you that by law the employes of the defendant company are competent witnesses in the case, and you have no right to arbitrarily reject any of their testimony merely because they are such employes, but it is your duty to receive, consider and weigh the same in connection with all the other testimony and circumstances and evidence in the case."

Again, instruction numbered 27, given for appellant, reads as follows:

"If you believe from the evidence that any witness who has testified in this case is interested in the result of this suit, as a party or otherwise, then, in determining the credit to be given to such witness, the jury may take into consideration such interest as the evidence shows such witness has together with all the other facts and circumstances disclosed by the evidence, if any, which

will aid the jury in arriving at and determining the credit to which the testimony of such witness is entitled."

If any defect existed in appellee's sixth instruction it was cured by the instructions so given for the appellant. In *West Chicago Street Railroad Co.* v. *Estep*, 162 Ill. 130, the following instruction was held to state a correct proposition of law, to-wit: "The jury are instructed that while the law permits a plaintiff in a case to testify on his own behalf, nevertheless the jury have a right, in weighing his evidence and determining how much credence is to be given to it, to take into consideration that he is the plaintiff, and his interest in the result of the suit." (See also *West Chicago Street Railroad Co.* v. *Nash*, 166 Ill. 528; *Chicago City Railway Co.* v. *Mager*, 185 id. 336).

Fifth—This case was tried in 1899, four years after the accident happened and after the appellee had reached the age of ten years. The appellee was placed upon the stand, and when asked how he was hurt stated that he did not remember. Appellant placed upon the stand a number of boys, to prove that the appellee made certain statements to them as to how he received the injury in answer to questions by them as to the cause of his having lost his leg. In other words, it was sought to prove admissions made by the appellee contrary to his statement that he could not remember how he was hurt. Many of the admissions thus proven as having been made by him were merely to the effect that he was playing in the street and went across the car tracks and saw no car, and in that way his leg was cut off In view of this class of admissions proven by the appellant, the appellee asked and the court gave to the jury an instruction stating to them "that the admissions of a child of the tender age of plaintiff at the time of the admissions, if any are proved, should be received more cautiously on account of his age than the admissions of an adult, and the jury should weigh them with reference to his age and understanding; in other words, that even while admissions of

an adult are received with great care and caution, those of an infant of the age of plaintiff at the time of the admissions must be received with still greater care and caution on account of his tender years and understanding at the time of the admissions." We see no objection to this instruction. An admission, if it is legally an admission, must be made by some one legally capable of making the same. The fact, about which the child was questioned by these boys, occurred when he was less than six years of age, and his rights certainly ought not to be taken away by childish prattle indulged in by him when trying to explain the cause of the injury received by him.

Sixth—Some other objections are made as to the refusal of instructions asked by appellant, and as to the admission and exclusion of evidence. But these objections are not of sufficient importance to deserve discussion. Sixty-one instructions were asked by appellant, most of which were given; and those, which were given, covered almost every phase of the case as presented by the evidence. Appellant's attorneys asked the mother of appellee some questions as to what instructions she gave to the appellee in regard to crossing the tracks; but the exclusion of this evidence worked no harm to the appellant, as many of the questions asked were immaterial and were not proper cross-examination. The child was not responsible for the acts of the mother, and, under the doctrine laid down in *Chicago City Railway Co.* v. *Wilcox*, *supra*, the negligence of the parent of a child of tender years, who is injured by the negligence of another, can not be imputed to the child, so as to support the defense of contributory negligence to his suit for damages.

We discover no error in the record which would justify a reversal of the judgment.

Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

CHARLES G. HUTCHINSON

v.

JENNIE C. HUTCHINSON.

Opinion filed April 16, 1902—Rehearing denied June 5, 1902.

1. MARRIAGE—*if marriage actually exists, subsequent admissions have no effect.* If the relation of lawful marriage has actually been created, the subsequent admissions of the wife to the contrary, no matter if solemnly and deliberately made, can have no effect to dissolve the marriage tie or relieve the other party from the obligations and duty of a husband and father.

2. The court reviews the evidence in this case at length, and holds that it establishes all the elements necessary to a common law marriage *per verba de presenti*, followed by cohabitation matrimonial in character and intent, and a full assumption of the marriage status in every legal aspect.

Hutchinson v. *Hutchinson*, 96 Ill. App. 52, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. W. BURKE, Judge, presiding.

FRANK P. BLAIR, (JAMES MAHER, and L. A. GILMORE, of counsel,) for appellant.

BANGS, WOOD & BANGS, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The circuit court of Cook county, on the hearing of a bill in chancery for separate maintenance filed by the appellee, found and declared that the appellant and the appellee were husband and wife and that the appellee was living separate and apart from the appellant, her husband, without her fault, and decreed that appellant should pay appellee $100 per month for the support of herself and their daughter Violet, the youngest child of the parties. An appeal prosecuted by the appellant re-

sulted in an affirmance of the decree in the Appellate Court for the First District. A further appeal in the same behalf has brought the record into this court.

The parties were never united in marriage by any ceremonial or public solemnization of the marriage rite between them. The finding of the circuit court was that they came together and agreed by a present contract to accept each other as husband and wife, and thereafter entered into the marriage relation and lived and cohabited together as husband and wife. The appellant admitted the cohabitation substantially as charged, conceded he had become the father of four children born to the appellee as the result of such cohabitation, but denied that any contract of marriage, *per verba de presenti* or otherwise, had ever been entered into between them or that any undivided repute of such marriage ever existed, but insists that his intercourse with her was purely meretricious and never matrimonial. The relation between them at its inception was illicit. It began in the year 1867, while appellee, a young girl, was a servant in the home of appellant's father, in the city of Chicago. The appellant, then a young man, made his home with his father. Appellee became pregnant with child—the fruit of their illicit intercourse. She testified he then promised to make her his wife and fixed a time when they would be married. He, however, went away from his home and she went to the home of her sister and instituted proceedings in bastardy against him, which he, with the aid of his father, settled by payment to her of $100 in cash and giving to her nine notes, each for the sum of $50, one of which fell due each year thereafter for nine years. Appellee was delivered of this child on the 8th day of July, 1868. The child was a daughter, and was given the mother's name, which was Jennie. Soon after the birth of this child the parents resumed their illicit intercourse, which continued until the year 1874, when appellee again became pregnant. The appellee testified that during this

time the appellant made repeated promises of marriage, and that when it became evident that she was again pregnant with another child of which he was the father, she insisted that the second child should not be born out of lawful wedlock; that he consented, and that a contract of marriage was verbally entered into between them in the month of April, 1875. Her testimony as to this contract of marriage was as follows: "Why, Mr. Hutchinson came to see me one evening. I felt rather blue and downhearted. He asked me what was the matter, and I said, 'You know what is the matter.' He said, 'I do.' He says, 'Is that all?' I said, 'Yes.' He looked at me for awhile, and he says, 'Jennie, are you willing to be my wife?' I said, 'Yes.' He took a ring out of his pocket and he placed it on my finger, and he said, 'I now take you for my wife.' I said, 'I now take you for my husband.' He put his arms around my neck and kissed me, and he said, 'Are you satisfied with that?' I said, 'Yes.' He says, 'From this night we are husband and wife.' 'Now,' he says, 'You go and get a flat and we will go housekeeping.' I says, 'I cannot leave mother just now, because she is on the point of death.' 'Well,' he says, 'as soon as you can.' I says, 'All right.'" Appellant denied these statements of the appellee, but the chancellor, who saw them both and heard them both testify, accepted her version as being true. No reason is perceived why we should insist the court fell into palpable error in regarding her as the more truthful of the two. In the light of all the testimony bearing upon the character of the appellant we heartily agree with the chancellor that of the two her statements are the more worthy of weight and credit.

The appellee testified that within about a month after the contract of marriage was entered into between them, and in pursuance of that contract, she left her home with her father and mother, and with the appellant as her husband began living together as husband and wife in a flat at 286 West Congress street, in the city of Chicago;

that their child Jennie resided in the family with them; that their second child was born while they so lived together in said flat, on the 17th day of August, 1875; that this child, a boy, was given the name of its father, Charles G. Hutchinson; that they resided together at the same place for a year and a half and then moved to West Lake street, where they continued to live and cohabit together as husband and wife for nine years and until the year 1884, during which time two other children, Grace and Violet, were born of their union; that soon after the birth of the fourth child he practically abandoned his home with her and their children, and, beyond the payment of sums not exceeding $50 per year, failed and refused to provide for the wants of herself or of the children.

The facts and circumstances bearing upon the life and conduct of appellant and appellee, and upon the question of the character of their cohabitation and the repute of their association among their neighbors and acquaintances, during the period of years intervening between April, 1875, the date when appellee testified the contract of marriage was entered into, and the year 1884, when she testified he deserted and abandoned her and their children, and the somewhat conflicting testimony bearing thereupon, to which counsel devote so many pages of their printed briefs, cannot be taken up *seriatim* and discussed without extending this opinion to an unreasonable length, nor would any benefit accrue from such discussion to the parties, their children, their counsel, the public or the profession. We patiently listened to the very full and forcible oral arguments of counsel, and have diligently read their printed briefs and arguments and freely consulted the testimony preserved in the record, and the result of our reflection and deliberation has only served to confirm in our minds the correctness of the views expressed by the Appellate Court as to the facts established by all the proofs upon these questions.

We therefore approve the following extract from the opinion of that court rendered by Mr. Justice WINDES:

"During all the time appellee lived at these different places, and up to the year 1884, when he entirely left and abandoned appellee and his children, he lived and cohabited with her and to all outward appearances sustained to her the relation of husband, though he was frequently absent from home, as he explained to her and to his children, on account of business or on hunting and fishing expeditions, as long as six weeks at a time. During that time appellant was known by certain of the friends and acquaintances of himself and appellee as her husband. He acknowledged all the four children as his own, always permitted them, without any remonstrance or objection, to call him papa and father, and when at home with appellee and his children he always occupied the same bed with appellee. He spoke to different persons of appellee as his wife. From 1875 to 1881, when he died, appellee's father lived in the same house with her, appellant and their children. Appellee says that some people called her Jennie Curtis at that time because her father lived with her, and admits that her daughter Jennie was registered in school under the name of Jennie Curtis, went by that name and was called by some children, though not all, Jennie Curtis. The children, during this time, visited very frequently at the home of appellant's parents and called them grandpa and grandma. Appellant's step-mother, his own mother being dead, frequently visited appellee and her children when they resided on Congress street and on Lake street, and after appellant abandoned appellee, and when she resided upon Randolph street, and frequently brought them presents of oranges, fruit, picture books and other things. She, appellant's step-mother, was also present on the occasion of the birth of one of the children, Grace, February 24, 1879, at the request of appellant, while they were residing at 286 West Congress street. She also went

with appellee and her oldest child, Jennie, and was present when the latter was confirmed at the cathedral of St. Peter and St. Paul. Appellant's father, it appears, was sick during this period and did not visit appellee and her children. The child born in August, 1875, was a son, was named Charles G. Hutchinson, (the same name as his father,) and has always been known and called by that name without any objection or remonstrance of any kind on the part of appellant, so far as shown by the record. He was at the time of the trial by profession a lawyer. From time to time after appellant abandoned appellee and his children, the two older children, Jennie and Charles G., frequently went to their father, being sent by their mother, to get assistance from him, which he gave at different times, but neither of these children, though the former was thirty years of age and the latter twenty-three years at the time of the filing of the bill, knew that their parents had never been formally married until appellant filed his answer. Then for the first time, and from the answer, did they know that appellant claimed he was not legally married to appellee. These two young people certainly knew what was the ostensible relation between appellee and appellant while they lived on Lake street, and the elder knew what it was when their home was on Congress street for about seven years. After appellant's desertion of appellee she says that she often asked him to return to and live with her, and he as often promised he would, but he never gave her, as she says, any satisfaction as to why he went away. He contributed, after the desertion, to the support and maintenance of appellee and the children different amounts, ranging from $35 to $50, about a year apart, but appellee says 'he didn't give on an average a year enough for one child to live on.' Appellant, according to his own testimony, is a man of large wealth and worth more than $275,000, besides numerous Chicago city lots and buildings thereon, and several large farms,

though he says that he never provided in any manner for the two older children. He says he never gave any of the children money when he was living on Lake street.

"Shortly before appellee went to live on Congress street, Frank Schuneman, who was in the coal business and subsequently married her niece, went to appellee's father's home in regard to coal, and says that appellee introduced appellant to witness as her husband; that witness talked with appellant with regard to coal, and appellant said: 'After we get settled we may want some coal also, and if you treat us right we shall patronize you—just as soon as we get settled; we were recently married; I shall need wood and coal, and we shall probably give you a call, provided you treat us right.' He further testified that later on he did receive an order from Mr. Hutchinson for wood and coal, and during 1875 and the following years,—as witness thinks, to 1882,—he took coal to 286 West Congress street quite a number of times; that sometimes he saw Mr. Hutchinson there, probably lying on the lounge asleep; sometimes he would be up. He also produced his books of account, which, during the year 1881, at different times showed charges of coal and credits of cash under the heading of 'Hutchinson, 286 Congress street.' The witness' books prior to 1881 had been destroyed by fire. He also saw Mr. Hutchinson at 365 Lake street when he visited the Hutchinson family there. He testified, on cross-examination, that when he was introduced to Mr. Hutchinson that was the first time witness ever met him; that he knew appellee and her parents before that time, and knew that she had had a child, Jennie, whose father he heard was Mr. Hutchinson, though he didn't know, at the time of the introduction, whether she was a married woman or not. He also says that sometimes other children called this child Jennie Curtis, but she was known as Jennie Hutchinson more. This child, Jennie, was known and registered in one school that she attended as Jennie Curtis,

and in another school she was registered as Jennie Hutchinson. She testified in this case (having been married) under the name of Jennie Schutte, and explains in her evidence that she reported to her mother that she was called Jennie Curtis in school; that her mother said it was a mistake, and just as soon as she was able she would have it changed. She also says she was registered at the Skinner school in Chicago, as late as 1883 and 1884, under the name of Jennie Curtis, and that it was prior to that time, in the Carpenter school, that she was registered as Jennie Hutchinson. Mrs. Emily Southwell, who knew the Hutchinsons when they resided on Congress street and who visited them there a number of times, testified, in substance, that one night she was sleeping with Mrs. Hutchinson when Mr. Hutchinson came home when he was not expected, and that witness had to go into another room and sleep with the children; that she was not there at meal time, but saw Mr. Hutchinson there in the day time. Priscilla Baldwin, who was a roomer at appellee's house when she lived on Lake street, says she first met Mr. Hutchinson there; that he came to her door, which was the front room of the house, on one occasion and asked for Mrs. Hutchinson; that witness replied, 'She is not in, I believe; did you wish to see her?' He said, 'Yes, she is my wife.' This witness testified that on another occasion when she was at a meal with Mr. and Mrs. Hutchinson and the children, 'I picked up one of the children and I said to Mr. Hutchinson, 'You have very lovely children and a good wife,' and he said, 'I have a good wife.' Q. 'Go ahead.' A. 'Very lovely children.' She also says that she lived in the family most of the time for three years, and during that time Mr. Hutchinson came and went at intervals; that 'he came and went from the house as any man does at home.' Also, that she was introduced by appellee to Mr. Hutchinson as appellee's husband; that appellee used the words, 'my husband.'"

Counsel for appellant so strenuously insist that the contention of the appellee that a valid present contract of marriage was entered into in 1875 was disproved by the testimony of Mary Tiffany and also by an instrument signed by the appellee in her maiden name in 1892, that we feel some reference should be made to such alleged countervailing testimony.

On cross-examination counsel for appellant asked appellee, in substance, in a question framed as for purposes of impeachment, if she did not, on one occasion, in 1883, go to the back door of the home of the appellant's step-mother, and in the presence of said Mary Tiffany, in reply to a statement of appellant's step-mother that she (the step-mother) was sorry to see her (the appellee) there again and that appellant would listen to nothing that she (the step-mother) might say to him, say, "If you would only have him marry me for my children." The appellee denied that she made such statement to the step-mother of appellant. Mrs. Emily Southwell, a witness for the appellee, whose testimony is referred to in the extract from the opinion of the Appellate Court, was asked, on cross-examination, by counsel for the appellant, if at one time, when she and Mary Tiffany were looking at some pictures in an album, she did not say to Mary Tiffany that she had never seen the appellant in the house where the appellee lived, at 286 West Congress street. Mrs. Southwell denied that she made the statement. Mary Tiffany was introduced as a witness for the purpose of impeaching these statements of the appellee and Mrs. Southwell. She answered the impeaching questions in the affirmative. But it did not follow that the chancellor should have accepted the testimony of this one witness as establishing the falsity of the statements of two other witnesses. That she gave testimony in absolute contradiction of that of the appellee and Mrs. Southwell logically operated to weaken the effect of her testimony as against each and either of them.

In 1892 the appellee received the sum of $4100 from the appellant and signed the following instrument:

"Office of James Maher, Attorney and Counselor. Room 14, 79 Clark street, Chicago, October 13, 1892.

"I, Jennie Curtis, of the city of Chicago, county of Cook, and State of Illinois, do hereby certify that I have this day received of Charles G. Hutchinson the sum of forty-one hundred ($4100) dollars in full of all demands I have or may have against the said Charles G. Hutchinson by reason of past relations or for any cause whatever; and I further certify that in consideration of the payment of the above sum, the receipt of which I hereby acknowledge, I have on this date freely discharged and released the said Charles G. Hutchinson from any and all claims and obligations to me.

JENNIE CURTIS."

"I, James Maher, do hereby certify that the above agreement was drawn up by me and was freely signed by Jennie Curtis in my presence after being by her read, the said Charles G. Hutchinson not being present at the signing thereof.

JAMES MAHER."

When the paper was signed the appellee was in sore need of money for the purpose of maintaining and supporting herself and providing for the children of herself and the appellant. She testified she so informed the appellant, and told him at many different times she could not meet the expenses of the family without more assistance from him; that she would like to have a home for herself and their children and be relieved of the expense of paying rent; that he finally told her to meet him at the corner of Clark and Randolph streets, in the city of Chicago, and he would make some provision for her; that she and their daughter Jennie (now Mrs. Schutte) met him at the appointed place, and that after some conversation between them he told her he would give her $4100,—$4000 thereof to be used in buying a home and $100 to buy a horse and buggy for their son, Charles; that he took them to some office,—she did not know whose office it was,—where the money was to be paid. She and her daughter both testified that after they arrived at the office, or just as they entered the office, the

appellant, in response to a remark made by their daughter, Jennie, to him with reference to a watch which the daughter contended the father had promised to give her, made a reply so highly indecent and insulting (wholly unfit to be here recited) that both mother and daughter became greatly agitated and began to weep and cry, whereupon appellant went away from the office; that a man whom they now recognized as one of appellant's counsel, Mr. Maher, came up to them and said to her and the daughter, "Come this way, please," and then presented the paper which had been previously prepared, and said to the appellee, "Sign this paper and sign with your maiden name;" that the appellee was greatly excited and agitated and did as directed without reading the paper or hearing it read, and that Mr. Maher paid her the money. Mr. Maher, counsel for appellant, also appeared as a witness for the appellant, and gave testimony contradictory, in some material respects, to that of appellee and her daughter as to the occurrences in his office, but he did not deny that he directed her to sign her maiden name nor that she was laboring under great excitement and weeping at the time. He was acting as counsel for appellant when the instrument was signed, and was of counsel in the same behalf on the hearing of the case in the trial court at the time he also appeared as a witness. The contents of the paper, and the fact she attached her maiden name to it, are in a degree inconsistent with her version of the relations which previously existed between herself and appellant, but not by any means of such great weight and force as to overturn her sworn testimony and the mass of other testimony to which it seems to be opposed. If signed under the circumstances detailed by the appellee and her daughter, the instrument was entitled to but little weight in arriving at the true relation which the appellant and the appellee bore to each other in the previous years of their lives. If the relation of lawful marriage had actually

been created and in fact existed, the subsequent admission of appellee to the contrary, no matter if solemnly and deliberately made, would have no effect to dissolve the marriage tie or to relieve the appellant from the obligations and duty of a husband and father.

A circumstance of perhaps not less weight tended to establish an admission on the part of the appellant that the status of marriage existed between himself and the appellee. The appellant loaned a sum of money to one Charles M. Miller, and to secure the same Miller conveyed to the appellant the absolute title to certain real estate in Cook county, taking back an agreement to reconvey the title to the property to Miller upon re-payment of the loan. Miller testified that in 1896 he said to the appellant, "Your brother George (since deceased) tells me you are married and have a wife and four children," and that appellant answered: "Well, I have; what of it? what is it to you?" I said, "It is a good deal to me, for it involves the title to the property which you hold—the property in which I live." Two letters written by the appellant in response to letters written him by Miller in relation to the ability of the appellant to re-convey full and clear title to the property to Miller were produced in evidence. In neither of the letters is there a denial of the statement which Miller testified George Hutchinson, appellant's brother, made to him to the effect appellant was a married man, which statement is repeated in substance in the letter and an answer thereto demanded, but in each letter the truth or falsity of the statement is entirely ignored.

The bill was not filed until 1898. The history of the lives of appellant and appellee and their children during the six years which intervened between the payment of the sum of $4100 and the filing of the bill is but vaguely developed by the proofs. The appellant contributed but little to the wants of his wife and children, but he provided money to pay for a silk dress for their daughter

Jennie and paid for a suit of clothes for their son, Charles. The wife conducted a boarding house, and with the assistance of their son, Charles G., who was clerk for some years in the post-office, the family was maintained and the children were kept in school. Our conclusion is, all of the elements necessary to a valid common law marriage,—a contract *per verba de presenti*, followed by cohabitation matrimonial in character and intent and a full assumption of the marriage status in every legal aspect,—were established by the proofs. (*Port* v. *Port*, 70 Ill. 484; *Elzas* v. *Elzas*, 171 id. 632; *Cartwright* v. *McGown*, 121 id. 388; *Laurence* v. *Laurence*, 164 id. 367; *Robinson* v. *Ruprecht*, 191 id. 424.) The abandonment of the wife and children was shown to be without just cause.

The equities were with the appellee, and the decree is eminently just and proper. It is affirmed.

Decree affirmed.

JAMES H. GILBERT, for use, etc.
v.
THOMAS W. SPRAGUE *et al.*

Opinion filed April 16, 1902—Rehearing denied June 4, 1902.

1. MORTGAGES—*when affidavit to extend chattel mortgage is filed in time.* Section 4 of the act relating to chattel mortgages, (Laws of 1891, p. 171,) permitting the extension of a chattel mortgage by filing an affidavit "within thirty days next preceding the maturity of said debt," is complied with by the filing of an affidavit the day after the note was due by its terms, where, at that time, the statute allowing days of grace had not been repealed.

2. SAME—*when an acknowledgment of chattel mortgage is not invalid.* An acknowledgment of a chattel mortgage, reciting, on its face, that the mortgagor is "a corporation organized under the laws of Illinois, of the town of South Chicago," is not invalid because taken before a justice of the peace in the town of Hyde Park instead of in the town of South Chicago, where the evidence shows that the corporation had its only office and place of business in the town of Hyde Park, where the property was located.

3. SAME—*whether mortgage was executed without authority is a question of fact.* Where the defendant to a suit on a replevin bond sets up

his title to the property under a chattel mortgage from a corporation, the question whether such mortgage was executed without authority is one of fact, which is settled by the judgment of the Appellate Court.

4. PRACTICE—*question of fact cannot be converted into one of law by putting it in a proposition.* A question of fact cannot be converted into a question of law by embodying it in a proposition to be held by the court, under the statute authorizing the presentation of propositions of law to be held by the court where a case is tried without a jury.

5. REPLEVIN—*right of defendant to suit on replevin bond to set up title to property.* The defendant in an action on a replevin bond, if the merits of the case have not been tried in the replevin suit, may, under the statute, plead such fact and set up his title as a defense to the suit on the bond; nor is he precluded from so doing because of an order in a previous chancery suit giving him the right to bring replevin, and providing that all questions of title should be determined in the replevin suit.

Gilbert v. *Sprague*, 88 Ill. App. 508, reversed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. FRANCIS ADAMS, Judge, presiding.

This is an action on a replevin bond, begun in the circuit court of Cook county on August 6, 1896, by the plaintiff in error, James H. Gilbert, suing for the use of William A. Harris and Thomas J. McGimsie, against the defendants in error, Thomas W. Sprague and Amasa H. Wilson. Defendants in error, Sprague and Wilson, filed a plea of *non debet;* also plea denying the execution of the bond; also plea denying any damage; and the further plea setting up the taking of a non-suit by the plaintiff in the replevin suit; that no trial was had on the merits; that the merits were undetermined, and that the property described in the writ of replevin was the property of Sprague, and not of Harris or McGimsie. Replications were filed, joining issue on all the pleas.

The suit was tried before the court by agreement without a jury. The trial court found the issues for the de-

fendants, and entered judgment upon the finding. An appeal was prayed to the Appellate Court, and the Appellate Court has affirmed the judgment of the circuit court. The present writ of error is prosecuted from such judgment of affirmance.

MASTERSON & HAFT, for plaintiff in error.

DEFREES, BRACE & RITTER, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The replevin suit, in which the replevin bond sued upon in the present suit was given, was begun by Sprague against Harris and McGimsie on December 2, 1893, and, by virtue of the replevin writ issued therein, Sprague obtained possession of the property in question. The replevin bond was signed by the defendant in error, Wilson, as surety. The replevin suit came to trial on July 3, 1896, and Sprague took a non-suit. In this suit upon the replevin bond for the value of the property taken, (Sprague having refused to turn it over on a writ of *retorno habendo*), Sprague and his surety, Wilson, have pleaded right of property in Sprague under the statutory provision to that effect. (3 Starr & Curt. Ann. Stat.—2d ed.—chap. 119, sec. 26, p. 3388). To substantiate his contention under the plea, Sprague relies upon a chattel mortgage, executed and delivered to him by the South Park Club Association, dated October 15, 1892, acknowledged October 22, 1892, and given to secure a note for $1000.00, bearing date October 15, 1892, and due sixty days after date. The trial court was asked by the plaintiff below, the plaintiff in error here, to hold certain propositions of law relating mainly to the validity of the chattel mortgage, and of certain proceedings thereunder, or in connection with the same. The propositions thus submitted by the plaintiff below were refused by

the court; and the points now made grow out of the alleged error committed by the court by its refusal of these propositions.

First—The first objection, made by the plaintiff in error, is that the affidavits, filed for the extension of the note secured by the chattel mortgage, were not filed within the time required by the statute.

The mortgage, and the note secured thereby, were dated October 15, 1892, and the note was payable sixty days after date. Section 4 of chapter 95 of the statute in relation to chattel mortgages, being the amendment to the Chattel Mortgage act passed in 1891, provides that a chattel mortgage, if *bona fide*, shall be good and valid from the time it is filed for record until the maturity of the entire debt or obligation, or extension thereof made as specified in the act: "*Provided*, such time shall not exceed two years from the filing of the mortgage, unless within thirty days next preceding the expiration of such two years, or if the said debt or obligation matures within such two years, then within thirty days next preceding the maturity of said debt or obligation the mortgagor and mortgagee, his or their agent or attorney shall file for record in the office of the recorder of deeds of the county where the original mortgage is recorded, also with the justice of the peace, or his successor, upon whose docket the same was entered, an affidavit setting forth particularly the interest, which the mortgagee has by virtue of such mortgage in the property therein mentioned," etc. (2 Starr & Curt. Ann. Stat.—2d ed.—p. 2753). Here, the affidavits for extension were made by Sprague and one Stewart, (the latter being president of the South Park Club Association,) on December 13, 1892, and stated that the mortgage would become due by reason of such extension on June 15, 1893. These affidavits were filed for record in the recorder's office of Cook county on December 15, 1892, and duplicates thereof were filed on the same day with George L. Ford, the justice of the peace who

took the acknowledgment of the mortgage, and made entry of the same upon his docket. It is claimed on the part of the plaintiff in error, that the note matured on December 14, 1892, and that the affidavits, not having been recorded and filed until December 15, 1892, were not filed for record "within thirty days next preceding the maturity" of the debt secured. At the time the note and mortgage in question were executed, the statute of this State gave to the maker of a note three days of grace in which he was entitled to make payment. Subsequently in 1895 an amendment to the act in relation to negotiable instruments was passed, providing that no promissory note shall be entitled to days of grace. (2 Starr & Curt. Ann. Stat.—2d ed.—p. 2813). The note, secured by the mortgage here under consideration, being entitled to days of grace, was not due until December 17, 1892, and, if the note is not to be regarded as having matured until the days of grace expired, then the affidavits were filed for record within thirty days next preceding the maturity of the debt secured by the mortgage. The word "maturity," as used in section 4 above quoted, means the time when the note becomes due and enforceable. The meaning undoubtedly is, that the affidavits must be filed for record within thirty days before the time arrives when the mortgagee becomes entitled to enforce the debt or obligation, or to maintain an action on the note. An action could not be maintained on a negotiable note prior to the act of 1895, above referred to, until the days of grace had expired. Here, the note, secured by the chattel mortgage, did not mature until the end of the days of grace to which it was entitled. (*Arnold* v. *Stock*, 81 Ill. 407; *Richards* v. *Matson*, 51 Ill. App. 530). The words of section 4, above quoted; do not require the affidavit for extension to be filed within thirty days preceding the maturity of the note, but within thirty days preceding the maturity of the "debt," secured by the chattel mortgage. The "debt," for which the note was given, did

not mature until December 17, or at the expiration of the days of grace. For these reasons, we are of the opinion that the affidavits for extension, having been filed within thirty days before the expiration of the days of grace, were filed within the time required by the statute.

Second—It is claimed, on the part of the plaintiff in error, that a part of the goods taken under the replevin writ were not covered by the chattel mortgage. This is a question of fact, and is settled by the decision of the Appellate Court. It is not before this court for review, as it is not raised by any of the propositions of law submitted to the trial court. The stipulation of facts, made in the present case, recites "that the South Park Club Association executed and delivered to Sprague a chattel mortgage dated October 15, 1892, and acknowledged October 22, 1892, said mortgage covering the goods and chattels replevied by Sprague in the action wherein the replevin bond now sued upon is given." By this clause of the stipulation of facts, it is admitted that the mortgage covered the goods and chattels which were replevied.

Third—The next objection made is, that the mortgage was executed without authority. It appears that, on October 25, 1892, at a meeting of the board of directors of the South Park Club Association, a resolution was passed by the board, authorizing the president of the association to execute and deliver the chattel mortgage to Thomas W. Sprague. As the mortgage was dated October 15, 1892, and acknowledged October 22, 1892, it is said that this resolution was passed after the execution of the mortgage, and that, therefore, its execution could not have been authorized by the resolution. The theory of plaintiff in error is, that this resolution did not ratify a mortgage already executed, but authorized the execution of one in the future. If the fact as to the authorizing of the mortgage was before us for our consideration, the evidence shows that the mortgage was not delivered until after the passage of the resolution, and was then

delivered in pursuance of the resolution. The mortgage only became effective from the time of the delivery of it, and this delivery was made after the passage of the resolution.

The question, whether or not the mortgage was executed without authority, was a question of fact, and is settled by the decision of the Appellate Court. It is true that, among the propositions of law submitted to the trial court by the plaintiff in error, and refused by the court, was one which announced that the court should hold that the chattel mortgage in evidence was executed without authority. But the submission of this proposition did not make the question a question of law. A question of fact cannot be converted into a question of law by putting it in the form of a proposition to be acted upon by the court. While the statute authorizes the submission of "written propositions to be held as law in the decision of the case" in trials before the court without a jury, and exception to be taken to the ruling upon such propositions, yet it does not authorize such exception to be taken to the rulings of the court upon questions of fact. In other words, the statute does not provide that propositions of fact should be submitted to the court to be held or refused, but embraces propositions of law only. (*Field* v. *Crawford*, 146 Ill. 136; *First Nat. Bank* v. *Northwestern Nat. Bank*, 152 id. 296; *Order of Foresters* v. *Schweitzer*, 171 id. 325). It follows that the objection, that the execution of the mortgage was without authority, is not well taken.

Fourth—It is next contended that the acknowledgment was invalid as having been taken before the wrong justice. The justice, before whom the chattel mortgage was acknowledged, was a justice of the peace of the town of Hyde Park, and it is said that the mortgage should have been acknowledged before a justice of the peace of the town of South Chicago, because the mortgage recites upon its face that the mortgagor, the South Park Club Association, is "a corporation organized under the laws

of Illinois of the town of South Chicago." The recital in the mortgage, that the mortgagor was of the town of South Chicago, did not estop the mortgagee from showing that the mortgagor's residence was in fact in some other town. (*Terhune* v. *Matson*, 40 Ill. App. 296). The testimony shows, that the South Park Club Association had its office and place of business in the town of Hyde Park, and no office or place of business except in that town; and the property in question, at the time of the execution of the mortgage, was located in Hyde Park. The statute requires that the mortgage shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides, and we think that, in view of what has been said, this provision of the statute was complied with in the present case, and so far as this mortgagor corporation is concerned.

Fifth—The next objection is, that Sprague was precluded from trying his title in this action upon the replevin bond, upon the alleged ground that, under an order of court, he could only try his title in the original replevin suit. The chattel mortgage was extended to June 15, 1893, but it appears that theretofore, on March 25, 1893, a creditor's bill was filed in the circuit court of Cook county by Harris & McGimsie against the South Park Club Association, and that, on March 29, 1893, a receiver was appointed by the court to take possession of the property of the association, and that he did take possession of such property pursuant to the order of the court, including the property here in controversy. The receiver was in possession of the property, when the debt secured by the chattel mortgage, became due in June, 1893. The receiver's interest in the personal property in his possession was sold at public sale and struck off for $25.00 to Harris & McGimsie, but without prejudice to any rights of Sprague; and the receiver was directed to sell and deliver the property to Harris & McGimsie subject to the rights of Sprague. In June, 1893,

Sprague filed an intervening petition in the chancery case, first without leave of court, but afterwards refiled it with leave of court, which petition recited the execution of the chattel mortgage to Sprague, and the extension of the mortgage, and prayed that an order be entered requiring the receiver to show cause why he should not turn over the property in the chattel mortgage to Sprague, the petitioner. Subsequently, and after the sale of the property by the receiver as above stated, an order was entered directing that the petition of Sprague be dismissed without prejudice to his rights, if any, "to be asserted in some other manner," and further reciting that Harris & McGimsie should not remove the property until Sprague had an opportunity to replevy the same, but should permit it to remain on the premises for at least ten days for that purpose. All parties were, by the order, restrained from interfering with Sprague's right to obtain possession of the property by writ of replevin, and it was ordered "that all questions of right and title of said personal property shall remain open and undisposed of, to be settled and determined in said replevin suit," etc.

It is in view of this order entered in the chancery suit that this objection is insisted upon. It is contended by plaintiff in error that by this order Sprague was confined to the replevin suit, as a means of asserting his title, and could not assert it in this action on the replevin bond. The purpose of the order was not to restrict Sprague in the assertion of his rights in the property to the replevin suit, but merely to preserve his right to assert his claim in that manner. The order in the chancery suit left his rights open for determination "in some other manner" than by means of the chancery suit.

Even, however, if this is not a correct construction of the order, section 26 of the Replevin act provides that, "when the merits of the case have not been determined in the trial of the action in which the bond was given,

the defendant in the action upon the replevin bond may plead that fact and his title to the property in dispute, in said action of replevin." (3 Starr & Curt. Ann. Stat. —2d ed.—p. 3388). The action on the replevin bond is merely a continuation of the replevin proceeding. The statute gives the party the right to set up his title, either in the replevin proceeding, or in an action on the bond, where the merits have not been tried in the original case. (*O'Donnell* v. *Colby*, 153 Ill. 324). Here, the merits were not tried in the replevin suit, as a non-suit was taken. The chancery court had no power to deprive Sprague of the use of any legal process, to which he was otherwise entitled to resort; and the order was broad enough to give him the right to assert his title in an action on the replevin bond for the purpose, at any rate, of reducing the damages. (*Stevison* v. *Earnest*, 80 Ill. 513). It follows that the objection now under consideration is without force.

Sixth—Further complaint is made by the plaintiff in error that the equitable plaintiffs were entitled to recover attorneys' fees incurred in the original replevin suit. The stipulation of facts, upon which the case was tried, provides that, "if the plaintiff in this case is entitled to recover an attorney's fee for defending the replevin suit, in which the bond sued on was given, $50.00 is a reasonable fee therefor." We are inclined to think that plaintiff in error was entitled to a judgment for nominal damages, and for his costs, and attorney's fees to the amount fixed by the stipulation. (*Schweer* v. *Schwabacher*, 17 Ill. App. 78; *Harts* v. *Wendell*, 26 id. 274; *Dalby* v. *Campbell*, id. 502; *Horner* v. *Boyden*, 27 id. 573; *Siegel* v. *Hanchett*, 33 id. 634; 2 Sutherland on Damages,—2d ed.—sec. 505).

Accordingly, the judgments of the Appellate and circuit courts are reversed, and the cause is remanded to the circuit court, with directions to proceed in accordance with the views herein expressed.

Reversed and remanded.

JAMES D. MORRISON *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed April 16, 1902—Rehearing denied June 4, 1902.

1. INDICTMENT—*when indictment sufficiently charges violation of Civil Service act.* An indictment charging that defendants, the acting civil service commissioners of Cook county, certified to the appointing officer the name and address of a named party for appointment as assistant engineer without subjecting him to a public competitive examination, and without giving notice of the time and place and general scope of the examination, as provided by law, sufficiently charges a violation of the County Civil Service act of 1895.

2. CONSTITUTIONAL LAW—*County Civil Service act does not embrace a subject not expressed in its title.* The County Civil Service act of 1895, (Laws of 1895, p. 137,) being "An act to amend section 61 of an act entitled 'An act to revise the law in relation to counties,'" etc., fairly falls within the subject matter of the original act and is germane to the general subject expressed in its title, and is not unconstitutional in that respect.

3. SAME—*County Civil Service act does not violate section 7 of article 10 of the constitution.* The legislature, in providing, by paragraph 10 of the County Civil Service act, (Laws of 1895, p. 141,) for the appointment of the civil service commission by the president of the county board, did not take out of the hands of the commissioners of Cook county the management of the county affairs, in violation of section 7 of article 10 of the constitution.

4. SAME—*County Civil Service act does not confer franchise upon president of county board.* The legislature, by the provisions of the County Civil Service act, properly conferred upon the president of the county board the power to appoint the civil service commission, and in so doing they did not confer a franchise upon him, in violation of section 22 of article 4 of the constitution. (*Lasher* v. *People*, 183 Ill. 226, distinguished.)

5. EVIDENCE—*admissibility of document bearing stamped signature.* The facts that a certificate of eligibility, under the County Civil Service act, bears the stamped signatures of the chairman and secretary of the commission, which certificate, in due course of business, found its way to the president of the county board, for whom it was intended, and which he acted upon in making the appointment, and that such chairman and secretary had a stamp like the one attached, which they used in their official capacity, raise a presumption that the certificate was duly issued by the commission, and justifies its admission in evidence against them upon their trial for issuing such certificate in violation of law.

6. CIVIL SERVICE—*when commissioner cannot say that issuing of certificate was not his act.* If an illegal certificate of eligibility is made under the rules of the civil service commission, which provide that such certificates shall be signed only by the chairman and secretary, the other member of the commission, who, under the rules of the commission, must be held to have acted, cannot say that the certificate was not his act because his name is not attached thereto.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

MCEWEN & WEISSENBACH, for plaintiffs in error.

H. J. HAMLIN, Attorney General, (CHARLES S. DENEEN, State's Attorney, and A. C. BARNES, of counsel,) for the People.

Mr. JUSTICE HAND delivered the opinion of the court:

The plaintiffs in error were indicted at the January term, 1901, of the criminal court of Cook county, as members of the civil service commission of said county, for an alleged violation of the provisions of the County Civil Service act, in force July 1, 1895. A motion to quash the indictment, and each count thereof, having been overruled, a plea of not guilty was entered, and upon a trial before a jury the plaintiffs in error were found guilty and each sentenced to pay a fine of $250, and the record has been brought to this court for further review.

The indictment contains two counts. The first count charges that the defendants, "on the seventeenth day of May, in the year of our Lord one thousand nine hundred, in said county of Cook in the State of Illinois, aforesaid, being then and there the acting civil service commission of Cook county, aforesaid, unlawfully, willfully and through culpable negligence, then and there did certify to the appointing officer, to-wit, James C. Irwin, then and there being the president of the board of commissioners of Cook county aforesaid, the name and address of one Charles McLean as entitled to appointment to the position of assistant engineer in the classified civil service

in said county, as classified by and under class D, rule 1, of the civil service rules theretofore made and adopted and promulgated by the said civil service commission of Cook county, and then and there being in force, which said rule 1 is in the words and letters as follows, to-wit: 'The following is hereby adopted as the classification of the places of employment in Cook county coming under the jurisdiction of the board of civil service commissioners with reference to examination for appointment under the Civil Service act. * * * Class 'D.' All positions to be filled by persons skilled in any one of the trades, and their assistants, including elevator men,' * * * without then and there or at any time prior thereto subjecting said Charles McLean to a public and competitive examination for said position of assistant engineer, as by law required."

The second count charges that the defendants, "on the seventeenth day of May, in the year of our Lord one thousand nine hundred, in said county of Cook, in the State of Illinois, aforesaid, being then and there the acting civil service commission of Cook county, aforesaid, unlawfully, willfully and through culpable negligence then and there did subject one Charles McLean to examination for the position of assistant engineer in the classified civil service of said county, as classified by and under class D of rule 1 of the civil service rules theretofore made, adopted and promulgated by the said civil service commission of Cook county, then and there in force, which said rule 1 is in the words and letters as follows, to-wit: 'The following is hereby adopted as the classification of the places of employment in Cook county coming under the jurisdiction of the board of civil service commissioners with reference to examination for appointment under the Civil Service act: * * * Class 'D.' All positions to be filled by persons skilled in any one of the trades, and their assistants, including elevator men,' * * * and did then and there certify to the appoint-

ing officer, to-wit, James C. Irwin, then and there being president of the board of commissioners of Cook county aforesaid, the name and address of said Charles McLean as entitled to appointment to the said position of assistant engineer in the classified civil service of said county as classified by and under class D of rule 1 of the said civil service rules theretofore made, adopted and promulgated, as aforesaid, and then and there in force, as aforesaid, without first having given notice of the time and place and the general scope of an examination to be held at the time and place of the said examination of said Charles McLean of applicants for such position in such classified service by said commission, by publication for two weeks preceding such examination then and there made of said Charles McLean, in a daily newspaper of general circulation published in said county, as provided and required by law."

It is first contended the court erred in failing to sustain the motion to quash the indictment.

Paragraph 10 of the County Civil Service act (1 Starr & Cur. Stat.—2d ed.—p. 1102,) provides for the appointment of a civil service commission in Cook county, consisting of three persons, by the president of the county board of said county; that two of such commissioners shall constitute a quorum; that not more than two members shall at the time of appointment be members of the same political party; that said commissioners shall hold no other lucrative office or employment under the United States, the State of Illinois, or any municipal corporation or political division thereof; that each commissioner, before entering upon the duties of his office, shall take the oath prescribed by the constitution of this State. Paragraph 11 provides the president of the county board may, in his discretion, remove any commissioner for incompetency, neglect of duty or malfeasance in office, and that all vacancies in the office of civil service commissioner shall be filled by appointment by said president.

Paragraph 12 provides said civil service commission shall classify all the offices and places of employment in said county with reference to the examinations in said act provided for, except those offices and places mentioned in the twentieth paragraph of said act, and that the offices and places so classified by the commission shall constitute the classified civil service of said county, and no appointments to any such offices or places, or removals therefrom, shall be made, except under and according to the rules in said act mentioned. Paragraph 13 provides said civil service commission shall makes rules to carry out the purposes of said act, and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules. Paragraph 14 provides for the publication of said rules and the time when the same shall take effect. Paragraph 15 provides for examinations of applicants for offices and places in said classified service, as follows: "All applicants for offices or places in said classified service, except those mentioned in the twentieth paragraph of this section, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. Such examinations shall be practical in their character and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate, of manual skill. No questions in any examination shall relate to political or religious opinion or affiliations. The commission shall control all examinations, and may, when an examination is to take place, designate a suitable number of persons, either in or not in the official service of said county, to be examiners, and it shall be the duty of such examiners, and, if in the official service, it shall be

a part of their official duty without extra compensation, to conduct such examination as the commission may direct, and make return or report thereof to said commission, and the commission may at any time substitute any other person, whether or not in such service, in the place of any one selected, and the commission may themselves at any time act as such examiners, and without appointing examiners. The examiners at any examination shall not all be members of the same political party." Paragraph 16 provides for notice of said examinations, and is as follows: "Notice of the time and place and general scope of every examination shall be given by the commission by publication for two weeks preceding such examination in a daily newspaper of general circulation published in said county, and such notice shall also be posted by said commission in a conspicuous place in their office for two weeks before such examination. Such further notice of examination may be given as the commission shall prescribe." Paragraph 17 provides that the commission, from the returns of the reports of the examiners, or from the examinations made by the commission, shall prepare a register for each grade or class of positions in the classified service of said county of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of such commission, and who are otherwise eligible, and such persons shall take rank upon the registers as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination. Paragraph 19 provides for the method of appointment to said classified service, and is as follows: "The head of the institution, department or office in which a position classified under this act is to be filled, shall notify the president of the board and said commission of that fact, and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the regis-

ter for the class or grade said position belongs to, except that in cases of laborers where a choice by competition is impracticable, said commission may provide by its rules that the selection shall be made by lot from among those candidates proved fit by examination. In making such certification, sex shall be disregarded, except when some statute, the rules of said commission or the appointing power specifies sex. Said appointing officer, meaning thereby the president of said board, shall notify said commission of each position to be filled separately, and shall fill such place by the appointment of the person certified by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules. At or before the expiration of the period of probation the officer having the power of appointment may, with the consent of said commission, discharge such person so appointed on probation upon assigning in writing to said commission his reasons therefor." Paragraph 41 provides: "Any person who shall willfully, or through culpable negligence violate any of the provisions of this act or any rule promulgated in accordance with the provisions thereof shall be guilty of a misdemeanor and shall, on conviction thereof, be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment in the discretion of the court." Under the provisions of paragraph 15 all applicants for offices or places in said classified service, except those mentioned in the twentieth paragraph of said act, within which exception the position of assistant engineer does not fall, shall be subjected to examination, which examination shall be public, competitive, and held only after notice of the time and place and general scope of such examination shall have been given by the commission in the manner provided in paragraph 16 of said act. The indictment charges that the plaintiffs in error certified to

the appointing officer the name and address of Charles McLean for appointment to the position of assistant engineer without subjecting him to a public, competitive examination, and without having given notice of the time and place and general scope of the examination at which he was examined, as provided by law. We are of the opinion the indictment sufficiently charges a violation of the provisions of said act.

It is further contended that the Cook County Civil Service act is unconstitutional, first, because the act embraces a subject not expressed in the title; second, because it deprives the board of Cook county commissioners, in part, of the management of the county affairs conferred upon them by section 7, article 10, of the constitution; and third, because it grants a franchise in the power it confers upon the president of the county board to appoint the civil service commission. The title of the act reads: "An act to amend section 61 of an act entitled 'An act to revise the law in relation to counties,' approved March 31, 1874, as amended by the act of May 20, 1879, relative to Cook county, as amended by act approved June 14, 1887, in force July 1, 1887."

Section 13, article 4, of the constitution, contains the following language: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The act in question was passed in the form of an amendment to section 61 of an act entitled "An act to revise the law in relation to counties," approved March 31, 1874, which section had theretofore been amended May 20, 1879, and again on June 14, 1887. The amendment fairly falls within the subject matter of the original act and is germane to the general subject expressed in its title, which is all that is required by the constitutional provision above quoted. *O'Leary* v. *Cook County*, 28 Ill. 534; *People* v. *Blue Mountain Joe*, 129 id. 370; *Potwin* v. *Johnson*, 108 id. 70.

In *People* v. *Blue Mountain Joe*, *supra*, it is said (p. 377): "If * * * the subject matter of the section under consideration is germane to the general subject expressed in the title, or forms a subordinate branch or part of such general subject, it must be held as embraced within the title of the act."

Section 7, article 10, of the constitution, is as follows: "The county affairs of Cook county shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the city of Chicago, and five from towns outside of said city, in such manner as may be provided by law."

It is urged that by reason of the fact that paragraph 10 of the County Civil Service act authorizes the president of the county board to appoint the civil service commission without the advice and consent of the board of county commissioners, it deprives the board of county commissioners, in part, of the management of the affairs of Cook county and is therefore unconstitutional and void. Under the provisions of said Civil Service act it is the duty of the civil service commission to determine what applicants are eligible for appointment to the offices and places of Cook county which are to be filled under the classified service created by said act, and to certify such eligibles to the president of the county board, whose duty it is to fill such offices and places from the persons certified to be eligible by the civil service commission. It is therefore apparent that the only office of the civil service commission is that of an examining board, whose duty it is to report the result of its examinations to the president of the county board, and that the president of the county board has no power other than to fill the offices and places within the classified service by appointment of the persons certified to him by the civil service commission as eligible for such positions, the object being to fill the offices and places which fall within the classified service by persons, only, who have shown

themselves by a public, competitive examination to be qualified and eligible to fill such positions under the law. We have no question of the power of the legislature to create such classified service, and to provide a method by which the offices and places which fall within such classified service shall be impartially filled from those alone who have proven themselves qualified and eligible by a public, competitive examination. Neither do we doubt the power of the legislature to empower the president of the county board to name a commission or board of examiners whose duty it shall be to determine, by a public, competitive examination, the persons who are qualified and eligible to appointment to the offices and places included within such classified service. The legislature, in providing for the appointment of the civil service commission by the president of the county board, did not take out of the hands of the commissioners of Cook county the management of the county affairs of said county.

In *People* v. *Kipley*, 171 Ill. 44, in construing the City Civil Service act and the constitutional power of the General Assembly in relation thereto, we said (p. 65): "In this State, when the General Assembly creates a municipal government, it has the power to provide the manner of filling the offices of such government. The legislature may select any means for the administration of the municipal government which it thinks best adapted to that end. It may provide for the election of municipal officers by the people, or may authorize any officers or persons to fill the offices by appointment. (*People* v. *Morgan*, 90 Ill. 558.) It has therefore the right to enact a law which provides that appointments to municipal offices or positions shall be made according to merit and fitness, and that such merit and fitness must be ascertained by a competitive examination."

It is further contended that the act is in conflict with section 22 of article 4 of the constitution, in this: that it grants a franchise to the president of the county board

in conferring power upon him to appoint the civil service commission. In *People* v. *Kipley*, *supra*, and *People* v. *Loeffler*, 175 Ill. 585, we held the act to regulate the civil service of cities constitutional. That act confers upon the mayor the power to appoint the civil service commission. If the legislature has the power to confer upon the mayor the power to appoint the civil service commissioners under that act in cities, we see no reason why it has not the power to confer upon the president of the board of Cook county the power to appoint the civil service commission under this act. The case of *Lasher* v. *People*, 183 Ill. 226, relied upon by plaintiffs in error, held a statute unconstitutional because under it the legislature attempted to vest the power of appointment in a private corporation. That case is not controlling here. The legislature properly conferred the power upon the president of the board to appoint said commission, and in so doing a franchise was not conferred upon him.

It is further contended the court erred in admitting in evidence the certificate issued to Charles McLean bearing the stamped signatures of James D. Morrison, chairman, and George W. Lovejoy, secretary of the said commission, without proof of their signatures. The undisputed evidence showed that Morrison was president and Lovejoy secretary of the commission; that they had in their office, which they used in their official capacity, a stamp similar to the one used upon said certificate. The fact that said signatures, so stamped, appeared upon the certificate in question, which in the due course of business found its way to the president of the county board, for whom it was intended, and which he acted upon in making the appointment in question, raised a presumption of fact that said certificate was duly executed by the president and secretary of said commission by attaching their signatures thereto, or authorizing the same to be attached thereto with said stamp. This presumption was not conclusive, but until overcome by proof was

sufficient to authorize the court to admit said certificate in evidence. It further appeared that the certificate was made in accordance with rule 6 of said board, which required that the certificate should be signed only by the chairman and secretary; and Walter A. Lantz, who must be held to have acted under the rules of the commission of which he was a member, cannot be heard to say that the certificate was not his act, simply because his name was not attached thereto. In general, where a signature is required the party's name printed upon the instrument with his sanction will suffice.

It was sought to be shown by the cross-examination of one of the People's witnesses that at the time McLean was examined and his name placed upon the register as one eligible to appointment as assistant engineer there was no person registered therein under the designation of engineer or assistant engineer. The court sustained an objection to such examination on the ground it was not proper cross-examination. Plaintiffs in error then offered to make the witness their own witness, whereupon the court held such evidence to be immaterial and refused to hear the same. The court did not err in this, as the board was not justified by reason of that fact in certifying for appointment one examined otherwise than as by law required.

A number of objections are made to the rulings of the court in giving, refusing and modifying instructions. We do not deem it necessary to take up and discuss said instructions separately, as it would serve no useful purpose, and the points raised have been mainly disposed of by what has been heretofore said in this opinion. Suffice it to say that we have carefully considered each of said instructions and what has been said with reference thereto by the respective parties in their briefs filed herein, and have reached the conclusion that the court committed no reversible error in its rulings thereon.

The judgment of the criminal court will be affirmed.

 Judgment affirmed.

THE CHICAGO CITY RAILWAY COMPANY
v.
ELLEN COONEY.

Opinion filed April 16, 1902—Rehearing denied June 5, 1902.

1. PLEADING—*effect of failure to allege due care—limitations.* Failure of the plaintiff in an action for negligence to allege due care upon her part amounts merely to a defect in her statement of her cause of action, and does not bar her right to file an amended count, more than two years after the injury, containing such allegation but otherwise the same as the original count.

2. SAME—*section 23 of Practice act, concerning amendments, construed.* That part of section 23 of the Practice act providing that "the adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action" does not apply to an order allowing a declaration in an action for negligence to be amended more than two years after the injury, so as to preclude the defense of the Statute of Limitations being raised by plea, and to require it to be raised by exception to the order allowing the amendment.

3. EVIDENCE—*evidence of a miscarriage may be shown under general allegations of damages.* In a personal injury case, evidence of a miscarriage, suffered some seven months after the injury, may be shown under allegations that the plaintiff "sustained serious and permanent physical injuries, internally and externally, was caused great pain, suffering and impairment of bodily health," etc.

4. APPEALS AND ERRORS—*when inaccuracy of instruction will not reverse.* Inaccuracy in an instruction is not ground for reversal, if, as applied to the evidence then before the jury, the inaccuracy could not have worked injury.

Chicago City Railway Co. v. *Cooney*, 95 Ill. App. 471, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

This is a suit brought by appellee, against appellant, to recover for injuries sustained by her in a collision between a wagon and one of appellant's street cars on which she was a passenger. A large wagon loaded with heavy iron pipes, some of which projected as much as eight feet from the rear end of the wagon, was backed

out of a building on the west side of Clark street across the tracks of appellant's road, and the ends of the pipes came into collision with appellant's train, consisting of a motor car and a trailer. Appellee was sitting in the forward car, and when she saw that a collision was imminent, attempted to get off the car, and in so doing fell and was injured. The suit was originally begun against the appellant company and Downey, the driver, and Burke, the owner of the wagon. After Downey had testified as a witness for appellee the suit was dismissed as to him. Burke was adjudged not guilty, but a verdict was found and judgment rendered against appellant for $2500. From the judgment of affirmance rendered by the Appellate Court for the First District this appeal was taken.

Appellee's declaration contained but one count originally, on which appellant joined issue. This count contained no allegation of due care on the part of plaintiff. After the trial began and certain witnesses had been heard, appellee, by leave of court, filed an amended declaration, which was substantially the same as the original, with the additional allegation that she was in the exercise of ordinary care for her own safety. It was in the main as follows: "That said servants of said company so improperly and carelessly drove, pushed and managed said electric car in which plaintiff was seated, and Downey so improperly and carelessly drove, pushed and managed said truck, that through the negligence and improper conduct of said servants, respectively, the said truck and electric car collided with great force and violence, by reason of which premises plaintiff was violently thrown to the ground there and sustained serious and permanent physical injuries, internally and externally, was caused great pain, suffering and impairment of bodily health, strength and ability to labor, and will the rest of her life sustain such pain, suffering and impairment, and that at, throughout and prior to said occurrence she

herself was in the exercise of ordinary care for her own safety." In addition to the general issue the defendant pleaded the Statute of Limitations to the amended count, to which plea a demurrer was sustained, and the defendant elected to stand by its plea. Motions for a new trial and in arrest of judgment were overruled.

One of the instructions given for appellee was the following:

8. "While it was the duty of plaintiff to employ such medical attention as ordinary prudence in her situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession, yet if she exercised such judgment and care, then, and in case (as provided in the other instructions) you find her entitled to recover, you may take into consideration all injuries and impairments, if any, which directly resulted from the occurrence in question, even though they resulted, in whole or in part, through mistakes of some one or of any of her medical attendants. This liability that a medical attendant (provided ordinary care was used in his selection) may make mistakes or errors is by you (but as limited by above provisions) to be considered as part of the immediate and direct damages resulting from the occurrence in question."

WILLIAM J. HYNES, S. S. PAGE, and WATSON J. FERRY, (MASON B. STARRING, of counsel,) for appellant.

ROSENTHAL, KURZ & HIRSCHL, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellant's first assignment of error is, that the trial court erred in sustaining the plaintiff's demurrer to its plea of the Statute of Limitations. It is contended that the original declaration was defective because it lacked the allegation that the plaintiff was exercising due care for her own safety, and for that reason stated no cause

of action, and that the cause of action stated in the amended declaration was barred by the statute, it having been filed more than two years after the cause of action accrued. That the original declaration stated a cause of action, though defectively, clearly appears, for the reason that it would have been sufficient after verdict, on motion in arrest of judgment or on error. (*Illinois Central Railroad Co.* v. *Simmons*, 38 Ill. 242; *Cox* v. *Brackett*, 41 id. 222; *Gerke* v. *Fancher*, 158 id. 375. See, also, *Consolidated Coal Co.* v. *Scheiber*, 167 Ill. 539.) The cause of action stated in the amended declaration was identical with the one stated in the original declaration, and the amendment amounted only to a re-statement of the cause of action, and not to a statement of a new cause of action. The demurrer to the plea of the statute was therefore properly sustained.

Appellee insists that it was too late to raise the question by the plea of the Statute of Limitations, but says it should have been raised by an exception to the order of the court allowing the amendment to be filed. In support of this view she contends that by the language of the statute such order is conclusive that the new count is the same as the old. The latter part of section 23 of the Practice act is as follows: "The adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action." (Hurd's Stat. 1899, p. 1287). The Statute of Limitations must be pleaded to be availed of, for it is the privilege of the pleader to avail himself of it or to waive it. A count containing a new cause of action, filed after two years, would be a good count, and a recovery could be had under the same if the statute was not interposed. The Statute of Limitations cannot be raised by an exception. We are of the opinion that said section 23 was not intended to apply to a question of this kind.

As seems to have become the practice in all such cases, counsel for the defendant moved the court, at the

close of the evidence, to instruct the jury to find the defendant not guilty. Under the assignment of error that the court erred in refusing such instruction, counsel have at great length discussed the controverted questions of fact,—the weight and preponderance of the evidence and the credibility of the witnesses. Such discussions are not only unnecessary and wholly useless for any purpose here, but are often a hindrance to the proper examination of the legal questions raised which this court has power to determine but which are obscured in the argument by the mass of facts with which they are interblended. Upon the point made it is sufficient to say that the evidence tended to prove the cause of action, and that it would have been error to give such an instruction.

The admission of testimony in regard to a miscarriage that appellee suffered seven months after the accident is assigned for error. It is claimed that such injury should have been declared on as matter for special damages, and that it was not covered by the allegations calling for general damages only. We are of the opinion that the evidence was properly admitted under the allegations of the declaration. (*Baltimore and Ohio Southwestern Railway Co.* v. *Slanker*, 180 Ill. 357; *Chicago City Railway Co.* v. *Anderson*, 182 id. 298; *West Chicago Street Railroad Co.* v. *Levy*, id. 525, and cases cited.) Whether such miscarriage was caused by the injury was a question of fact for the jury, but that such an injury might be the proximate cause of a miscarriage is too well known to admit of controversy.

It is assigned as error that the court made improper remarks in the presence and hearing of the jury. The only remarks we consider it necessary to notice are the following:

The court: "I am afraid I shall have to interpose an objection myself if you are going to take up the time of the court with immaterial matter. You might as well ask her if she did not get up in the morning during the several different years." * * *

The court: "She said she generally took a little medicine in the spring. That does not prove her health was not good.

Counsel for appellant: "Yes, it does, your Honor.

The court: "I don't see how it can. Thousands of people do that."

We regard these remarks of the court as improper, but not of sufficient importance to work a reversal of the judgment. It appears from the record that counsel was inquiring about her former testimony as to her health prior to the accident, and that his questions had been fully answered; that she said she had not had a doctor, but had sometimes taken a little medicine in the spring-time. It does not appear that the cross-examination was improperly abridged, and while the remarks complained of should have been omitted, we are satisfied they could not have affected the result before a jury of ordinary intelligence.

The eighth instruction given for the plaintiff, set out in the preceding statement of the case, is claimed to be erroneous because of the inclusion in it of the words "in whole." While it is true that if her "injuries and impairments" were *wholly* due to mistakes in her medical treatment she could not recover from appellant for such injuries and impairments, still the instruction could not have prejudiced the defendant in the case. It was established by the evidence, and is not controverted, that she suffered injuries in the accident for which she was sent to the hospital, where she remained for some time under treatment, and that her "impairments" were not *wholly* due to mistakes in treatment. The liability to mistakes in treatment is incident to the injury, and where such mistakes occur,—the injured party using ordinary care in the selection of her medical attendants,—the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the original injury. (*Pullman Palace Car Co.* v. *Bluhm*, 109

Ill. 20.) As applied to the evidence then before the jury, the inaccuracy in the instruction complained of could not have worked any injury to the defense.

Other questions of minor importance have been raised by counsel and considered by the court, but we are unable to find that any substantial error was committed in the trial of the case. The judgment will therefore be affirmed.

Judgment affirmed.

SALLIE E. REED

v.

W. IRVING JENNINGS *et al.*

Opinion filed April 16, 1902—Rehearing denied June 4, 1902.

1. MORTGAGES—*when a party cannot be regarded as an innocent purchaser.* If a wife relies wholly upon representations of her husband that it would take but a certain sum of money to release a trust deed as to certain lots he desired her to purchase from him, the fact that the husband subsequently obtained a release does not entitle the wife to be regarded as an innocent purchaser, in a proceeding to cancel the release, where the release was not authorized by the terms of the trust deed, which was recorded, and was rescinded and the money tendered to the husband within an hour after execution, and before the husband had conveyed to his wife.

2. SAME—*mortgagee's lien not affected by arrangement between a mortgagor and his grantees.* The lien of a mortgagee cannot be discharged or affected by an agreement entered into between the mortgagor and one to whom he may dispose of his interest in the mortgaged premises; but the mortgagee may restrict or apportion his lien, in accordance with such agreement, if all interested parties consent.

3. SAME—*unauthorized release of trust deed—effect.* In equity, the release of a trust deed, if unauthorized by the terms of the trust deed or by the *cestui que trust*, will have no effect upon the deed of trust, as between the original parties or as to the subsequent purchasers with notice.

4. SAME—*effect of the trustee's possession of notes secured by trust deed.* The fact that a trustee in a deed of trust has possession of the notes secured, for the purpose of collecting them, does not confer authority to release the deed as to portions of the property, except in compliance with the terms of the instrument.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES A. BISHOP, Judge, presiding.

WALTER OLDS, for appellant.

PADDOCK & BILLINGS, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

On the 15th day of July, 1892, one Hans A. Calland executed a trust deed in the nature of a mortgage to the Chicago Title and Trust Company as trustee, whereby he conveyed in trust, by way of mortgage, one hundred and forty-one lots to secure his notes in the sum of $32,500. The notes so secured were thirty-two in number, each being for the sum of $1000, except the last, which was for the sum of $1500. The notes were numbered consecutively, from 1 to 32. Numbers 1 to 8, inclusive, fell due in one year after date; 9 to 16, inclusive, fell due in two years; 17 to 24, inclusive, in three years, and 25 to 32, inclusive, in four years. The trust deed contained provisions authorizing the redemption and release of the lots separately, upon payment of specified sums. Under this clause Calland, the mortgagor, paid the sum of about $19,000 of the indebtedness, and notes representing that amount were canceled and sixty-four lots were released from the lien of the trust deed. Said Calland, the mortgagor, sold and conveyed a number of the remaining lots to M. H. Rundell, who assumed and agreed to pay notes Nos. 22 to 31, inclusive, each for $1000, being the total sum of $10,000, with interest thereon from July 15, 1895. Four other of the lots were sold to other of the defendants, each of whom assumed the payment of specified sums of indebtedness secured by the trust deed. On October 23, 1897, said Calland held title to thirty of the lots, upon which, should Rundell and the other prior pur-

chasers of the other lots pay the amounts assumed by them, respectively, to be paid upon the mortgage debt, it would be only necessary to pay $2700 and accrued interest to discharge them from the lien of the mortgage. Aside from the contracts of the subsequent purchasers a much larger sum would have been required to be paid to release the thirty lots from the mortgage or trust deed. Calland contracted to sell twenty-nine of said thirty lots to Hugh T. Reed, husband of the appellant, for the sum of $10,000. Reed assumed to pay $2450 of the said $2700, and conveyed to Calland other property in payment of the remainder of the purchase price of the twenty-nine lots. Calland afterwards paid the sum of $250 and the interest thereon, and secured the release of the only remaining lot to which he held title. This payment and release were in pursuance of the provisions of the trust deed authorizing the release of separate lots. Reed, on the 13th day of July, 1898, paid to said Chicago Title and Trust Company, the trustee in the said trust deed or mortgage, the said sum of $2450, and accrued interest thereon, and received a release deed purporting to discharge the twenty-nine lots which he purchased from Calland from the further lien of the trust deed. The sum thus paid by Reed was insufficient, following the provisions of the trust deed, to authorize the trustee to release his twenty-nine lots. Within perhaps an hour after the execution of this release deed to Reed the Chicago Title and Trust Company discovered the error, and claimed that the release was issued to Reed without compliance upon his part with the requirements of the deed of trust; that it was unauthorized by the holders of the notes secured by the deed of trust and was therefore without legal force, tendered to return the money he had paid and demanded that he should surrender up to it the release deed. Reed refused to comply with the demand, and on the following day, the 14th day of July, 1898, conveyed the lots to the appellant, his wife. The Chicago

Title and Trust Company on the same day filed a petition in chancery praying that the release deed be canceled and expunged from the records. Soon after, the appellees, the holders and owners of the notes secured by the trust deed to the Chicago Title and Trust Company, as trustee, filed a bill in chancery for the foreclosure of the trust deed and also for the cancellation of the deed of release. The two causes were consolidated, and upon a hearing a decree was rendered canceling the release on the return of the sum paid to the Chicago Title and Trust Company by said Hugh T. Reed, and also decreeing that all the lots, save the sixty-four theretofore released, as aforesaid, should be sold by the master in chancery for the purpose of discharging the amount declared by the decree to be due and unpaid upon the notes held by the appellees. The appellant prosecuted an appeal, but the decree was affirmed by the Appellate Court for the First District, and the record is before us upon a further appeal prosecuted on her behalf.

It is first contended the appellant, Mrs. Sallie E. Reed, should have been regarded by the chancellor as an innocent purchaser for value of the twenty-nine lots, and that she should have been protected as a *bona fide* purchaser against all efforts to cancel the deed of release and thereby subject her property to the lien of the mortgage.

The appellant, Mrs. Reed, had inherited some property from the estate of her father, who died in Indianapolis, Indiana. While she was at her brother's house in Indianapolis, soon after her father's death, in the month of July, 1898, and prior to the execution of the deed of release, her husband, in response to a letter written by her asking him to come to Indianapolis, answered that he could not come; that he had to secure some money to meet and discharge a mortgage, and in reply to which she wrote to him that if he would come to Indianapolis she thought she could provide him with the money. He went to Indianapolis, and it was agreed between them

that she should pay him the sum of $3850 (which she secured by the sale of a portion of her interest in her father's estate) for the twenty-nine lots in question. She was informed by him that the lots were subject to a mortgage, but he told her that there was only the sum of $2450, and some interest thereon, remaining to be paid to release the lots from the mortgage upon them, and that the lots would then be clear, except some amounts due for taxes and special assessments, and that out of the money received from her he would pay all liens of all kinds and convey the lots to her free and clear of any manner of encumbrances. She paid him the sum of $3850, and with the funds thus provided he returned to Chicago, procured the release to be executed by the Chicago Title and Trust Company and delivered to him, placed the same on record, executed a deed conveying the lots, through the medium of a trustee, to her, and had the deed placed of record for her, as he had agreed with her to do. The trust deed on the lots stood of record in the county of Cook, and the law charged the appellant, Mrs. Reed, with notice of the lien thereby created upon the lots, and with knowledge of all the terms and conditions of the trust deed. In addition to that, her husband carried to her actual knowledge that the lots were subject to a mortgage. She was not induced to part with her money by any act done or representation made by the trustee in the trust deed or by the holders of the notes secured thereby. She acted solely upon the faith of the representations made to her by her husband, and neither the appellees nor the trustee in the trust deed were responsible for his statements to her. True, her husband did succeed in inducing the trustee in the trust deed to execute a release upon payment of the amount he told her remained to be paid to discharge the lien of the trust deed; but this release was not issued until after she had parted with her money, and it could not in any way have induced her to act to her injury or prejudice. If the hus-

band had procured the release prior to going to Indianapolis, and had taken the release with him and exhibited it to her, and she had parted with her money on the faith of the release and without notice of lack of power in the trustee to make the release, a different question would have been presented. But her acts were not induced by the execution of the release, or by anything said or done by the holders of the notes or by the trustee. She acted relying upon the representations made by her husband, and her rights and position must depend upon the correctness of such representations.

It is clear the amounts that Rundell and two other purchasers of lots from Calland assumed and agreed to pay on the indebtedness secured by the trust deed, and the amount of $2450, and interest thereon, which the husband of the appellant assumed and agreed to pay, would equal the entire amount secured to be paid by the deed of trust. But these assumptions of portions of the mortgage indebtedness had no effect to discharge the lien of the mortgage upon all or any of the lots described in the mortgage or trust deed, by force merely of the agreements of assumption between these various purchasers and the mortgagor, Calland. The lien in favor of a mortgagee cannot be discharged or affected by an agreement entered into between the mortgagor and one to whom he may dispose of his interest in the mortgaged premises. In such a case the mortgagee might restrict or apportion the lien of his mortgage in accordance with such agreements of assumption, if all persons interested in the mortgaged property should consent. But after a careful examination of the evidence preserved in the record we are inclined to agree with the chancellor and the Appellate Court that the evidence did not prove the assumptions and agreements in question were or became anything more than agreements and contracts between the mortgagor and subsequent purchasers from him. It appeared in the proofs the appellees, holders of the notes

secured by the mortgage, were advised of the contracts of assumption entered into by and between the mortgagor and the subsequent purchasers of the mortgaged lots, and also that appellees were willing and anxious to receive the total amount due on the indebtedness secured by the trust deed, and encouraged the subsequent grantees to act together in making payment in full, according as they had, respectively, agreed with Calland. We agree with the trial and the Appellate Courts there was no sufficient proof any of them were induced to believe releases would be granted to any one except upon payment of the whole indebtedness or payment in full for specified lots, in accordance with the provisions of the deed of trust authorizing the release of separate lots. There is no proof of an express agreement or novation. Nor do we find in the proof any sufficient foundation for the position that Reed was induced to believe, or was justified in believing, either before he made his purchase from Calland or afterward, that the lien of the mortgage as to the twenty-nine lots purchased by him would be restricted or limited to the sum which would remain unpaid according to the assumptions of the prior purchasers of the lots from Calland. At all events, it cannot be demonstrated from the proof preserved in the record that the chancellor was clearly and manifestly in error in the finding upon this point, and that being true, we should accept this conclusion of the chancellor. Under the provisions of the trust deed a much larger sum would be required to effect the redemption of the twenty-nine lots conveyed to Reed than the amount he assumed with Calland to pay.

The Chicago Title and Trust Company, in executing the release of the mortgage or trust deed, was exercising the power possessed by a trustee under the trust deed. It was its duty, and, in the absence of authority from the holders of the notes secured by the trust deed, in any equitable view, the limit of its powers, to release

the lots upon payment in compliance with the terms and provisions of the trust deed. The rule in equity has been thus stated in this jurisdiction: The release of the lien of a trust deed by the trustee, if "unauthorized by the terms of the trust or by the *cestui que trust*, will have no effect upon the deed of trust, as between the original parties or as to subsequent purchasers with notice." (*Barbour* v. *Scottish-American Mortgage Co.* 102 Ill. 121; *Stiger* v. *Bent*, 111 id. 328; *Insurance Co.* v. *Eldridge*, 102 U. S. 545; *Williams* v. *Jackson*, 107 id. 478). The fact the title and trust company had possession of the notes and had power to collect them did not increase its authority to release the lien of the trust deed. Its authority in this respect was to receive money in payment of the notes. (1 Am. & Eng. Ency. of Law,—2d ed.—p. 1027). Reed was charged by law with notice of the power of the trustee in that respect. He knew the other subsequent purchasers had not paid the amounts they had assumed and agreed to pay, and that the amount he paid was not sufficient to discharge his property from the requirements and condition of the trust deed. In addition, there was evidence which the chancellor accepted as showing that Reed had been advised and had actual knowledge that he was not entitled to demand or receive a release from the trustee, and that the trustee was without authority to execute a release to him for the amounts he was willing to pay. Mr. Broomel and Mr. Richards testified, in substance, that they explained to Reed that his contract with Calland did not entitle him to redeem from the trust deed, except under the terms and conditions of that instrument. The release deed was disaffirmed almost immediately and the money paid by Reed tendered to be returned to him. The appellee holders of the notes secured by the trust deed refused to receive the money, and it remained in the custody of the Chicago Title and Trust Company subject to the demand of the holder of the mortgaged lots, and was tendered into court with the

bill asking a decree canceling the release deed. The lack of power in the trustee to execute the deed of release fully authorized the chancellor to decree the cancellation thereof.

Whether the equities of the case entitled the appellant to an order directing the sale of the lots belonging to Rundell and the application of the proceeds of such sale to the extinguishment of the decree debt before her lots should be appropriated for that purpose is not raised by the record or suggested by counsel.

The decree is affirmed. *Decree affirmed.*

THE CHICAGO AND EASTERN ILLINOIS RAILROAD CO. *et al.*

v.

GEORGE HUSTON, Admr.

Opinion filed April 16, 1902—Rehearing denied June 5, 1902.

1. EVIDENCE—*what competent as tending to show intent of deceased to become passenger on train.* Where the principal controversy in an action to recover for the death of a boy is whether the deceased was a trespasser on the tracks or was crossing the tracks to take passage on a train then about due, it is not error to permit the boy's father to testify that he had given the son a nickel to pay his fare home some half an hour before the happening of the accident, and that a nickel was all the money found in his possession after the accident.

2. INSTRUCTIONS—*instruction should not tell jury what acts constitute negligence.* It is not proper for an instruction to tell the jury what acts or omissions constitute negligence, or that it was the duty of the deceased to have looked and listened, and that "he could not have failed to see the engine as it was approaching and he must have neglected to look."

3. DAMAGES—*law presumes a pecuniary loss to father from death of son.* If the deceased is a minor and leaves a father entitled to his services, the law presumes there has been a pecuniary loss to the father from the son's death, for which compensation, under the statute, may be given.

C. & E. I. R. R. Co. v. *Huston*, 95 Ill. App. 350, affirmed.

Appeal from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. M. Kavanagh, Judge, presiding.

W. H. Lyford, and Kenesaw M. Landis, (Sol. Rosenblatt, of counsel,) for appellants

Thornton & Chancellor, for appellee.

Mr. Justice Carter delivered the opinion of the court:

This was an action on the case brought by appellee, as administrator, to recover damages for the death of Frank B. Huston, his son, a young man of about seventeen years of age. The son was struck and killed by a locomotive of the Chicago and Eastern Illinois Railroad Company on the evening of May 11, 1895, at or near the Seventy-second street suburban station of the appellant's road, in Chicago. The locomotive was going north rapidly, without any cars attached, the engine driver evidently intending to run past this station without stopping. At the station were two parallel tracks running north and south, used for passenger trains exclusively, the easternmost one for north-bound passengers and the other for those bound south. There was a passenger platform along the east side of the tracks and another one between the two tracks. The principal dispute was whether the deceased was walking on the track, and thus a trespasser, when he was struck by the locomotive, or whether he was in the act of crossing the track to take passage on the south-bound train from the platform between the tracks. The evidence on this point was very conflicting. A south-bound passenger train was due at this station about the time of the accident.

At the close of appellee's evidence, and again at the close of all the evidence, appellants moved the court to instruct the jury to find for appellants, which instruction

the court refused. There was no error in refusing the instruction, inasmuch as the question whether deceased was in the exercise of due care for his own safety was one especially for the jury to determine under the conflicting evidence in the case. The jury returned a verdict for $3600 damages, and the judgment on this verdict was affirmed by the Appellate Court.

The appellee was allowed to testify, over the objections of appellants, that he gave his son a nickel a half or three-quarters of an hour before the accident, when he left home, and that a nickel was all the money found in his possession after the accident. It is claimed that this testimony was irrelevant and not part of the *res gestæ*, but too remote in time to be properly considered by the jury, and that it was error to admit it. The object of the testimony was to show that the deceased had secured the means of paying his fare to his home before leaving his father, and, in connection with other circumstances in evidence, that he was at or near the railroad platform with the intention and for the purpose of taking passage on the train approaching from the north, and was then crossing the track to the proper platform for that purpose when he was struck by the locomotive running north. A number of cases are cited by appellants to sustain their contention that the testimony was inadmissible, but all of them refer to statements or declarations made by the party injured, some time either before or after the accident. No declaration or conversation was here admitted in evidence but the mere fact that the deceased came to his father just as he was leaving home and that his father gave him a nickel. His father did not see him again till after the accident. The act of getting and receiving the nickel, and the finding of it in his pocket at the station, were competent as circumstances tending to show, in connection with other circumstances, the purpose of the deceased in being at the railroad station. If he had attempted to cross the easternmost track,

upon which the locomotive was running, to reach the platform where passengers entered cars running south on the next track, with no means with which to pay his fare, that would have been a circumstance tending to prove that he did not intend to become a passenger on the then approaching train. The converse of this proposition would not necessarily be true, still it was not error to admit it as a circumstance in the proof.

The refusal of appellants' seventh instruction is urged as error. It is not proper to tell the jury what acts or omissions will constitute negligence, or that it was the duty of the deceased to have looked and listened, and "that he could not have failed to see the engine as it was approaching, and that he must have neglected to look," as would have been done had this instruction been given. (*Chicago, Burlington and Quincy Railroad Co.* v. *Gunderson*, 174 Ill. 495.) The question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury as one of fact. *Chicago and Northwestern Railway Co.* v. *Hansen*, 166 Ill. 623.

It is claimed by the appellants that no damages were proved and that the verdict is therefore unsupported by the evidence. The deceased was the son of and worked for appellee, and had been paid by him as high as $12 a week for his services. It is contended that the evidence showed that he was an expense to his father and that appellee received no pecuniary benefit from him. His father was not obliged to pay him anything for his services. Where the deceased is a minor and leaves a father entitled to his services, the law presumes there has been a pecuniary loss from his death, for which compensation, under the statute, may be given. *City of Chicago* v. *Scholten*, 75 Ill. 468; *Bradley* v. *Sattler*, 156 id. 603.

Finding no error the judgment will be affirmed.

Judgment affirmed.

IN THE MATTER OF EDWARD TOBIN, Deceased.

Opinion filed April 16, 1902—Rehearing denied June 5, 1902.

1. WILLS—*when attestation is in testator's presence.* If the testator is propped up in bed so that he can plainly see a table some ten feet away, in the same room, and can see enough of the act of signing to know that the witnesses and the will are in his presence and that the former are signing their names as witnesses to his will in accordance with his request, it is sufficient, even though the bodies of the witnesses, when the signing is done, are between the testator and the table, so that he cannot see the pen nor the letters traced by it, nor, probably, the hand that held the pen.

2. SAME—*beneficiaries in a will are not competent to testify in its favor against heirs-at-law.* Parties who are beneficiaries under a will and trustees to carry out its provisions cannot testify in favor of the will, where the heirs-at-law are resisting probate thereof.

3. SAME—*proponent not limited to subscribing witnesses in circuit court.* On appeal to the circuit court from an order of the county court denying probate, the proponent is not concluded by the testimony of a subscribing witness that the testator did not have testamentary capacity, but may prove that fact by other witnesses.

4. TRIAL—*when propositions are properly refused.* Propositions presented to be held as the law of the case are properly refused where they are not in the nature of propositions of law, but merely statements and special findings of fact.

CARTWRIGHT, J., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. E. P. VAIL, Judge, presiding.

KERR & KERR, for appellant.

BASTRUP & O'NEILL, M. H. GUERIN, W. C. H. KEOUGH, and COLLINS & FLETCHER, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

An instrument purporting to be the last will of Edward Tobin, deceased, was offered for probate in the probate court of Cook county and probate was refused. Thomas J. Raycroft, trustee and executor of said will, then appealed to the circuit court, where a trial was had before the court without a jury and probate was again refused, and he has now appealed to this court.

The alleged will was signed by Edward Tobin February 2, 1900, in a room in the Mercy Hospital, Chicago, and was witnessed by Katherine Sicklesteel, Achilles Davis and Joseph V. Mukautz. The contestants contend, and the circuit court seems to have been of the opinion, that the will was not attested in the presence of the testator. Tobin was sick in bed at the time of the execution of the will. The room in which he was lying was about fifteen feet square, and contained, besides his bed, a couch, a dresser, several chairs, a small medicine table, and another table which the witnesses used while signing their names. The bed was against the south wall of the room, —a little east of the middle,—with its head-board against the wall. The table used for signing stood towards the north-west corner of the room. There is a difference of opinion among the witnesses as to its exact location when they used it to write on, one witness placing it a few feet nearer the bed than the others, but at the farthest it could not have been more than ten feet away from the testator when the witnesses signed their names. There were present in the room the three attesting witnesses and Thomas J. Raycroft and Hannah Sullivan, the two latter being, respectively, a nephew and niece of the testator and were named as trustees in the will. The witness Mukautz brought the draft of the will with him when he entered the room, and Raycroft aroused the testator, who was sleeping. Mukautz read the will over to him, and at his request re-read some parts of it, and asked him if he was willing that his nurse, the doctor and Mukautz should witness it, and he said yes. Tobin was propped up with pillows. There were four or five pillows back of him, and he was sitting in the middle of the bed, substantially in an upright position. The will was put on a book or board to write on, and Tobin signed his name to it. All the witnesses saw him sign it. After he had signed he sank back on the pillows, but the pillows were not taken out nor Tobin laid back, but he re-

mained in an upright position until after the witnesses had signed and attested the will. After the testator had signed the will Mukautz took it and laid it on the table, upon which the witnesses signed it. Mukautz testified that he drew the table out of the corner for convenience in signing, while the other two subscribing witnesses testified that the table was not moved. The three witnesses signed in the order named. First the nurse, Katherine Sicklesteel, wrote her name, standing in front of the table, with her back to Tobin, while Dr. Davis stood to one side. Then they exchanged places, and Dr. Davis signed, with his back to the testator, and then Mukautz signed in the same position. The contention of appellees is, that as the bodies of the witnesses intercepted the testator's view of the table and the will, the act of attestation was not done in his presence, as required by the statute. Dr. Davis and Miss Sicklesteel, two of the three subscribing witnesses, testified that Tobin could not see the witnesses sign; that he could only see the body of the person who was writing. Dr. Davis also said that his back did not hide the whole table, but that the testator could see part of it,—how much he did not know. The table was two feet and eight inches long, one foot and ten inches wide and two feet and five inches high, and the witnesses were at the side of the table when they signed. This fact, and a reference to the plat introduced in evidence, clearly show that a person sitting up in the middle of the bed could see the table in either of the positions the witnesses located it.

Great stress is laid by the contestants on *Drury* v. *Connell*, 177 Ill. 43, where it was said (p. 47): "The purpose of the statute is not attained by mere ability to see the witnesses or some part of them, but the act of attestation is the thing which must be in the presence of the testator. In the case of *Witt* v. *Gardiner*, 158 Ill. 176, the rule as to what constitutes the 'presence' of the testator, within the meaning of the statute, was considered and

settled. The rule as so determined is, that 'contiguity, with an uninterrupted view between testator and subscribing witnesses, is the indispensable element of the physical signing in the testator's presence.' It is immaterial that he does not see if he might have done so; but no mere contiguity of the witnesses will be sufficient if the testator cannot see them sign. Nothing will constitute a 'presence,' within the meaning of the statute, unless the testator can, from his actual position, see the act of attestation. * * * The act of attestation must be performed within the range of the testator's vision, and in such a way that he could know that it was his will which was being attested and could see the act of signing."

In the case at bar we think there is no doubt that the testator could have seen the table and the witnesses if he chose to look, but he could not see the pen in the hand of any witness tracing the letters of the witness' name. He could see the witness Mukautz take the will and lay it down on the table, and see each of the witnesses step up to the table and bend down over it while signing. Whether he could see any part of the will while they were in the act of signing does not appear, but he saw or could have seen Mukautz place the will on the table and that there was no other paper there, and could have seen the will itself on the table when his view was not obstructed by the body of the witness while subscribing his name. He had just heard the will read and had asked the witnesses to sign it. The table was directly, or nearly so, in front of him,—less than ten feet away,—and he could see the witnesses over the foot-board of the bed while they were in the act of signing their names, although he could not see the pen or the letters traced by it, and probably not the hand that held the pen. The cases cited above lay down the rule by which the courts of this State should be guided, with sufficient certainty. We have never held that it is necessary to a valid attestation that the testator must be able to see the pen and

the letters composing the witness' name as the former is held and the latter are traced by the subscribing witness. If he can see the act of attestation,—that is, can see enough of the act of signing to know that the witnesses and the will are in his presence and that the former are at the time signing their names as witnesses to his will in accordance with his request,—that will be sufficient. It is necessary only that the attestation be done in his presence and that he be able to see the act. We are of the opinion that the evidence sufficiently established the fact that the will was attested by the subscribing witnesses in the presence of the testator and at his request.

Counsel for appellant complain of the decision of the court in refusing to hold as law in the decision of the case certain propositions presented on behalf of the appellant. These propositions were mere statements of facts, and were not in the nature of propositions of law at all. The court is not required to make a special finding and statement of the facts in the case, and these supposed propositions of law were properly refused.

The appellant has also assigned as error the refusal of the circuit court to allow Thomas J. Raycroft and Hannah Sullivan, both of whom were present when the will was executed and attested, to testify to the facts of such execution and attestation. They were parties to the proceeding for the probate of the will and were beneficiaries under it, and were also trustees to carry into effect its provisions. The opposite parties were heirs-at-law of the deceased and were contesting the probate of the will. It was therefore not error to exclude the testimony of these witnesses.

Two of the three witnesses who had subscribed their names as witnesses to the will, certifying that it was executed in their presence by the testator and that he had requested them to sign as such witnesses and that they had done so in his presence, gave, as we have seen, all the testimony there was which tended to prove that he

could not see them sign as such witnesses and therefore that it was not signed in his presence, and refused to testify they believed him to be of sound mind and memory when he executed the will. Dr. Davis testified that he did not know what the testator's mental condition was, and Katherine Sicklesteel testified that she did not believe that he had sufficient mental capacity to understand and transact ordinary business affairs. But the trial was had in the circuit court on appeal from an order of the county court refusing probate of the will, and the proponents were not confined to the testimony of the subscribing witnesses, but had the right to support the will by any evidence competent to establish a will in chancery, under section 13 of the act in regard to wills, and the fact was sufficiently established by the testimony of other witnesses having equal opportunities to know his mental condition, that he was at the time of sound mind and memory, although greatly weakened physically by sickness.

While we do not find that the trial court erred in its holding upon propositions submitted to be held as law in the decision of the case, still we are of the opinion that the preponderance of the evidence in the case was in favor of the proponents of the will upon the two principal questions presented to the court for its decision on the application for probate,—that is to say, that the will was properly attested by the subscribing witnesses in the presence of the testator and at his request, and that he was of sound mind and memory,—which, in the absence of any evidence of fraud, compulsion or other improper conduct, was sufficient to admit the will to probate.

The judgment of the circuit court refusing probate will be reversed and the cause remanded to that court, with directions to enter a judgment admitting said will to probate as the last will of Edward Tobin, deceased.

Reversed and remanded, with directions.

Mr. JUSTICE CARTWRIGHT, dissenting.

THE SOUTH CHICAGO CITY RAILWAY COMPANY *et al.*
v.
THE CITY OF CHICAGO.

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. SPECIAL ASSESSMENTS—*assessment to pay condemnation judgment is collateral to condemnation proceeding.* The levying of a special assessment, under section 53 of article 9 of the City and Village act, to raise the money to pay a condemnation judgment for widening a street, is collateral to the condemnation proceeding, and if the court had jurisdiction to render the condemnation judgment its validity cannot be attacked in the assessment proceeding.

2. SAME—*effect where condemnation judgment is against part, only, of the land described in ordinance.* The court has jurisdiction to render condemnation judgment against part, only, of the land designated in the ordinance to be condemned for widening a street, and the validity of the judgment cannot be attacked upon that ground in a supplemental proceeding to levy an assessment upon property benefited, to pay the condemnation judgment.

3. SAME—*when section 53 of article 9 of City and Village act applies to assessment proceeding.* Under section 99 of the Local Improvement act of 1897, if a condemnation proceeding was pending when the act took effect, a supplemental proceeding to levy a special assessment to pay the condemnation judgment is governed by section 53 of article 9 of the City and Village act of 1872.

4. SAME—*former dedication of property condemned cannot be set up in assessment proceeding.* An objection that the property against which a condemnation judgment for widening a street was entered had been dedicated to the city for street purposes prior to the filing of the condemnation petition cannot be urged in the supplemental proceeding to levy an assessment to pay such judgment.

5. SAME—*what a sufficient description of railroad property assessed.* An assessment petition to pay the amount of a condemnation judgment, which describes the property of a street railway company assessed as "right of way, right of occupancy, franchise and interest of the South Chicago City Railway Company in and upon Ontario avenue, from Seventy-ninth street to Eighty-third street," is sufficiently certain and definite.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

CHAS. C. GILBERT, and K. K. KNAPP, for appellants.

WILLIAM M. PINDELL, for appellee.

Mr. Justice Magruder delivered the opinion of the court:

This is an appeal from a judgment of confirmation, entered by the superior court of Cook county on December 6, 1901, against the lands of the appellants, the South Chicago City Railway Company and the Illinois Steel Company, in a supplemental proceeding begun by the filing of a supplemental petition on July 24, 1901, to pay a judgment of condemnation, theretofore entered, awarding compensation for the taking of the lands of the appellants in a condemnation proceeding for the widening of Ontario avenue in the city of Chicago. The petition in the condemnation proceeding was filed on October 16, 1891, and the judgment of confirmation was entered on March 9, 1892. The supplemental petition was filed under section 53 of article 9 of part 1 of the City and Village act of 1872, as amended in 1891. The ordinance, providing for the widening of Ontario avenue, which was passed on May 25, 1891, by the city council of Chicago, directed that it should be widened from Seventy-ninth street to a point south of Eighty-second street. By the verdict rendered in the condemnation proceeding, the jury found the just compensation to be paid to the owner or owners of the south 107 feet of the north 140 feet of the west 33 feet of the north half of fractional section 32, etc., sought to be taken by and for the proposed improvement, to be the sum of $2475.00.

It will thus be noticed, that the judgment rendered was a judgment condemning only a part of the lands, which the ordinance directed to be condemned. The strip, directed to be condemned by the ordinance, was much longer in extent than the strip actually condemned by the judgment. In other words, the judgment did not condemn all of the lands, which were directed to be condemned for the purpose of widening the street, but only a part of the same.

The appellants, upon the trial below before the superior court, filed various objections to the confirmation of the assessment in the supplemental proceeding. All these objections were overruled.

First—The main objection, now insisted upon by the appellants, is that the city condemned a strip of land only 107 feet long, whereas the ordinance required the widening of the avenue by the condemnation of a strip much longer than 107 feet. It is claimed, that in this way the city has not made the improvement directed by the ordinance, but, on the contrary, has abandoned such improvement, and that therefore it was error to confirm an assessment of benefits, if any, caused by the condemnation of 107 feet, based upon an ordinance requiring the condemnation of a strip much longer than 107 feet. Before filing the supplementary petition, the city obtained an order from the superior court, dismissing the petition in the condemnation case, in so far as it related to all the property necessary to be condemned for the widening of the street, except the south 107 feet above mentioned.

The question, thus presented by the objection so made, is whether it is within the power of a city to proceed against only a part of the land, for the condemnation of which the ordinance provides. This question cannot be raised in the supplemental proceeding, begun for the purpose of raising the amount necessary to pay the compensation awarded by the condemnation judgment. The supplemental proceeding, provided for in section 53 of article 9 of the City and Village act of 1872, is collateral to the condemnation proceeding. The condemnation judgment is final and conclusive as to the parties thereto, until it is reversed or vacated. Hence, a question, which properly arose in the condemnation proceeding, cannot be litigated in the supplemental proceeding. (*Newman* v. *City of Chicago*, 153 Ill. 469.) The object of the latter proceeding is merely to raise funds to pay the judgment of condemnation already entered. It cannot be said that

the court, which rendered the condemnation judgment, did not have jurisdiction to render such a judgment, even though it condemned only a part of the land, described in the ordinance, upon which the petition for condemnation was based. If the court had jurisdiction to render such judgment, then its validity cannot be attacked in a collateral proceeding.

That the court did have such jurisdiction is a question, which has already been decided. In *Pardridge* v. *Village of Hyde Park*, 131 Ill. 537, which was a special assessment proceeding, an assessment roll had been filed, showing the compensation to be made for property taken for opening Forrestville avenue in Hyde Park from Forty-first street to Forty-seventh street. The trial court, having ascertained by the verdict of a jury that the village of Hyde Park had taken possession of that part of Forrestville avenue lying between Forty-first and Forty-second streets, entered a judgment dismissing the proceedings, except as to the property between Forty-first and Forty-second streets. The judgment of condemnation therein entered awarded a certain amount as compensation for opening the street between Forty-first and Forty-second streets only, and appointed commissioners to make a special assessment to raise that amount; and it was there claimed, that a new assessment could not be made to raise money to pay the compensation for taking the land between Forty-first and Forty-second streets without a new enabling ordinance. But we there held that the passage of a new ordinance was not necessary. It was contended by counsel in that case, that a street must be opened as an entirety, and that, if only a part of it was opened, no assessment could be collected to pay for such part. But the decision in that case was adverse to the contention thus made. It was there said, that the condemnation judgment could be paid by special assessment under the original ordinance. The same question arose in *Allen* v. *City of Chicago*, 176 Ill. 113, where it was said (p. 123):

"Neither is it necessary, to authorize the supplementary proceeding provided by section 53 as quoted, that the city should by condemnation have secured an easement in all the property necessary for the street. * * * The objection taken by these appellants that, by the judgment of condemnation, the city had not acquired property of other defendants before the commencement of the supplemental proceeding, was no bar to this proceeding, and constituted no defense in this case. It was not error to overrule that objection." (See also *Goodwillie* v. *City of Lake View*, 137 Ill. 51; *People ex rel.* v. *Village of Hyde Park*, 117 id. 462; *Village of Hyde Park* v. *Corwith*, 122 id. 441).

It is claimed on the part of appellants, that this proceeding is under the act of June 14, 1897, concerning local improvements; but such is not the case. Section 99 of the act of 1897 provides "that the laws subsisting at the passage of this act shall continue to apply to all proceedings for the condemnation of lands, or the confirmation of special assessments or special taxes for local improvements which are pending in any court in this State when this act shall take effect. * * * Where ordinance for local improvements, to be made by special tax or special assessment, shall have been already passed when this act shall take effect, upon which no court proceedings shall have been then begun, the proceedings shall be as herein provided, with the same effect as if such ordinance had originated with the board of local improvements herein provided for." (Laws of Ill. of 1897, p. 135). The condemnation proceeding, to which the present assessment proceeding is supplemental, was pending when the act of 1897 was passed, and, therefore, the City and Village Act of 1872 continued to apply to the proceedings instituted for the purpose of raising the amount necessary to pay the judgment in that condemnation proceeding. By an amendment to said section 53, passed in 1891, it is provided, among other things, as follows: "And every such cause shall be considered as pending in the

court in which the same has been, or shall be commenced, until all the lands sought to be taken are paid for, or until the proceedings are dismissed where the lands have not been taken." (1 Starr & Curt. Ann. Stat.—2d ed.—p. 779; *City of Chicago* v. *Hayward*, 176 Ill. 130). It is admitted by counsel for appellants, that the condemnation proceeding was still pending on July 23, 1901, so far as it related to the rest of the land described in the ordinance for the widening of Ontario avenue, except the 107 feet condemned by the judgment therein entered. It was in a pending proceeding that the order of dismissal, hereinbefore referred to, was entered on July 3, 1901.

Second—It is urged on the part of the appellants, that there had been, prior to the filing of the petition for condemnation, a dedication of the 107 feet in question by the owners thereof for street purposes, and that, therefore, the 107 feet being public property, and not private property, could not be condemned. This question cannot be raised in the present proceeding. The objection, that there was a former dedication, amounts to the assertion that the property condemned was not private property, but belonged to the city or public. The question, whether the property condemned was private property or not, was an issue involved in the condemnation proceeding. The judgment in condemnation, not being subject to collateral attack in the supplemental proceeding, must be regarded as a determination of the question, whether there was or was not a dedication of the 107 feet in question. (*Newman* v. *City of Chicago*, 153 Ill. 469). It appears, however, that the trial court allowed evidence to be heard upon this question of dedication, and, after hearing the same, found that there had been no dedication of the lands here in question before the entry of the judgment of condemnation.

Third—The property assessed to the appellant, the South Chicago City Railway Company, is described as follows: "Right of way, right of occupancy, franchise

and interest of the South Chicago City Railway Company in and upon Ontario avenue from Seventy-ninth street to Eighty-third street." It is claimed that this description is too uncertain and indefinite to base any assessment upon it. It has, however, been held by this court in several cases, that railway property, as thus described, is of such a character that a special assessment can be levied upon it. (*Lake Street Elevated Railroad Co.* v. *City of Chicago*, 183 Ill. 75; *Cicero and Proviso Street Railway Co.* v. *City of Chicago*, 176 id. 501; *West Chicago Street Railroad Co.* v. *City of Chicago*, 178 id. 339). The objection is without force, and was properly overruled.

The judgment of the superior court of Cook county is affirmed.

Judgment affirmed.

THE CITY OF CHICAGO

v.

JOHN JACKSON.

Opinion filed April 16, 1902—Petition stricken from files June 5, 1902.

1. POLICE POWER—*whether an act is within the police power is for the courts to determine.* While a municipal corporation has the right to determine, through its power delegated by the State, what is a reasonable exercise of its police power, yet it cannot arbitrarily attribute the doing of an act to the police power, and it is a question for the courts to determine, finally, whether the act is within the police power.

2. MUNICIPAL CORPORATIONS—*interference with access to property by changing grade of street is a damage.* Any change in the grade of a street by which ingress to or egress from private property is obstructed is a damage to private property for public use, within the meaning of section 13 of article 2 of the constitution.

3. TRACK ELEVATION—*city liable for damages from changing grade of street.* Under the provisions of our present constitution a city is liable for any injury and damage occasioned to the property of the citizen by changes in the grade of the street on which such property abuts, whether such change is made by the city directly or by some corporation in obedience to a track elevation ordinance.

4. EVIDENCE—*diversion of traffic is not an element of damages.* In an action against a city for damages occasioned by changing the grade

of a street, diversion of traffic is not a proper element for the consideration of the jury, either as an element of damage or as bearing upon the question whether access to the property had been interfered with by the change of grade.

5. SAME—*what evidence improper on question of damages.* In a suit against a city for damage from the change in the grade of a street by the construction of a sub-way, under track elevation ordinance, evidence as to the number of trains which stopped at such street before and after the construction of the sub-way is inadmissible.

6. APPEALS AND ERRORS—*when errors in matters of procedure will not reverse.* If substantial justice has been accomplished through the trial in an action against a city for changing the grade of a street, and where it seems obvious that no decision more favorable to the appellant would result from another trial, the judgment will not be reversed because of errors in procedure.

7. REHEARINGS—*same party cannot have more than one petition.* It is the practice of the Supreme Court not to consider more than one petition for rehearing by the same party in the same cause, and the court will of its own motion strike a second petition from files.

City of Chicago v. *Jackson*, 88 Ill. App. 130, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

CHARLES M. WALKER, Corporation Counsel, and THOS. J. SUTHERLAND, for appellant.

HAMLIN & BOYDEN, H. S. MECARTNEY, and LOUIS M. GREELEY, for appellee.

Per CURIAM: This action on the case was brought in the superior court of Cook county by appellee, against appellant, to recover damages for an injury to property fronting on West Fortieth street. In his declaration he avers that his property fronted on said street, and that prior to the acts complained of there was direct and convenient access to the same from the street, as well as egress therefrom, for persons and vehicles; that the street in front of the premises was level and on the same grade with the premises. He then avers that defendant, regardless of the rights of the plaintiff, in the year 1895

wrongfully excavated, or caused to be excavated, the said street in front of and adjacent to his premises, and constructed therein a sub-way of wood, stone, iron and other materials, of great depth below the grade of the street as it existed prior thereto, (describing the depression of the street and construction of the sub-way,) and charges that by means thereof the free and convenient access to his premises, and free communication between said premises and the street, has been entirely destroyed and cut off, and the said premises rendered unfit for the uses to which they were best adapted and for which they are most valuable, and the reasonable enjoyment and use of the same seriously interfered with, by means of which his rights in the premises have been violated, etc. He further avers that the excavation and sub-way were without his consent, and without making any compensation to him for the damages and injury occasioned, and without any proceedings to ascertain such damages, as provided by law, and that the defendant has refused and still refuses to make such compensation.

The city filed a plea of not guilty, upon which issue was joined and the case tried by the jury. At the close of all the evidence the defendant asked the court to instruct the jury to return a verdict in its favor, but the request was denied and an exception duly taken. The jury was then instructed that "if they believed, from the evidence, that the plaintiff's property was depreciated in its fair cash market value by the change of grade in the street, over and above any benefit conferred upon the property by the improvement, taken as a whole, they should find the defendant guilty, and assess the plaintiff's damages at such sum as they believed, from the evidence and under the instructions of the court, such property had been depreciated in its fair cash market value by reason of such change of grade." To the giving of this instruction the defendant also duly excepted. A verdict was returned in favor of the plaintiff, fixing his damages at $2000, upon

which the superior court, after overruling a motion for new trial, entered judgment. The city appealed to the Appellate Court for the First District, where the judgment was affirmed, and it now prosecutes this further appeal.

It appeared from an ordinance of the city introduced in evidence upon the trial, passed February 18, 1895, that the Chicago and Northwestern Railway Company was required to elevate the plane of its road-bed and tracks across this and other streets so as to obviate the grade crossings, that company having, at the time, its railroad track across the streets on the same level. The ordinance describes at length the required elevation of the railroad tracks and provides (sec. 4) for sub-ways changing the grade of the street, as follows: "At * * * the above named streets and avenues [West Fortieth street being one of the streets named] sub-ways therein shall be constructed, passing through said embankments and beneath said tracks so to be elevated as aforesaid, as follows: * * * All of which said sub-ways shall generally conform to the descriptions and dimensions contained in a schedule hereunto annexed and made part of this ordinance, entitled 'Schedule of Sub-ways'." The schedule of sub-ways describes the manner in which the excavations shall be made, how the sub-ways shall be constructed, etc. Section 15 provides that "when said railway shall be elevated in accordance with the provisions of this ordinance, or when any section thereof shall be so elevated and ready for use, then and thereupon all provisions of the ordinances of the city relating to speed of railway trains in said city, the giving of signals upon such trains, and the maintenance of gates, flagmen, watchmen, signals and signal-towers, shall cease to be applicable to such railway company so far as the lines of said road shall be elevated as herein required." Section 16 provides that the ordinance shall take effect from and after its passage, approval and publication,

provided that it shall be null and void unless said railway company shall, through its authorized officers, file with the mayor of the city, within sixty days from the passage of the ordinance, an agreement duly executed, whereby said railway company shall undertake to do and perform all the matters and things required of it by the ordinance, which "agreement by said railway company shall be made as a return for any liabilities * * * against it for any damages to adjacent property or business in consequence of change of grade of streets, avenues, alleys or the railway, or of the performance by the railway company of the matters and things in this ordinance required of the railway, and which agreement shall be held to relieve and protect said company from all liability to said city or others for such damages to adjacent property or business in consequence of change of grade of streets, avenues, alleys or the railway, or of the performance by the railway company of the matters and things in this ordinance required of it, save that for any damages occasioned by the negligent manner of doing said work by said company it shall be liable. After the filing of said agreement, as aforesaid, this ordinance shall not be materially modified or amended without the consent of said railway company, but nothing in this ordinance contained shall be deemed a waiver or surrender of the police power of the city or to deprive the city of the right to properly exercise such power." It further appears that the railway company did accept the provisions of the ordinance and elevated its tracks in conformity with the provisions thereof, making the subways as therein provided.

The plaintiff's property described in the declaration is situated on the south side of the railroad, fronting on said street, there being an alley between it and the right of way of the railroad company. The improvement was a two-story brick building, the first story being occupied as a saloon and the second story for roomers. The first

floor, prior to the excavation, was nearly on a level with the street. In making the sub-way the railroad company cut down the street in front of the building, so that the sidewalk is now four feet above the roadway and the floor of the building four feet above the sidewalk, making the floor eight feet above the grade of the street, and requiring seven steps in the sidewalk at the north-west corner of plaintiff's building and seven steps from the sidewalk in order to reach the level of the first floor of the house. It is not denied by the city that the property was damaged in the manner alleged.

The theory of the plaintiff's case is, that the city having thus changed the grade of the street, or caused the same to be done, so as to damage his property, he is entitled to recover under that provision of the constitution which provides, "private property shall not be taken or damaged for public use without just compensation." The city insists there can be no recovery, for the reason that "private property has not been taken for public use," but that whatever injury has been done to plaintiff's property is the result of the legitimate exercise of the police power of the State and the damages *damnum absque injuria*. Therefore, it is insisted, it was error in the trial court to refuse the peremptory instruction to find for the defendant and to give instruction No. 1 on behalf of the plaintiff.

The question in this form is a new one in this State, and so far as we have been able to ascertain has never been directly decided by any court. It is a question of the first importance both to the city and property holders upon streets over which the railroads in the city must be elevated, in the interest of the public safety to life and property.

It would seem from section 15 of the foregoing ordinance that the improvement was made rather by the agreement of parties than by the order or command of the city, and that both parties understood and contem-

plated damages to private property as a result of the work. That section is wholly inconsistent with the idea that the tracks of the railroad were elevated and the sub-way constructed in obedience to a requirement of the city in the exercise of its police power. But aside from any question of that kind, we think the judgments of the superior and Appellate Courts on this branch of the case must be affirmed. It is conceded by all parties that the municipality had the right, in the legal exercise of its police power within reasonable limits, to require the railroad company to elevate its tracks so as to avoid the grade crossing upon the street, and thus protect the lives and property of its citizens. (*Chicago and Northwestern Railway Co.* v. *City of Chicago*, 140 Ill. 309; *New York and New England Railroad Co.* v. *Bristol*, 151 U. S. 556; *Burlington and Quincy Railroad Co.* v. *City of Chicago*, 166 id. 226.) Many other authorities might be cited to the same effect, but the question is now regarded as not an open one. It is also well settled that every corporation and citizen holds its or his "property subject to the proper exercise of this power, either by the State legislature directly, or by public corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled 'police laws or regulations;' and it is well settled that laws and regulations of this character, though they may destroy the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." (Dillon on Mun. Corp. sec. 212; Sedgwick on Stat. and Const. Law, 435; *Bancroft* v. *City of Cambridge*,

126 Mass. 438; *Railroad Co.* v. *Commissioners*, 79 Me. 386.) The maxim of the law is, "*salus populi est suprema lex*,"—the safety of the people is the supreme object of the law. It is not a taking of private property for public use, but a restraint on the wrongful use of property by the owner, in violation of the rule, *sic utere tuo ut alienum non lædas.* See authorities above, and *People* v. *Budd*, 117 N. Y. 1; *State* v. *Moore*, 104 N. C. 714; *Chicago, Burlington and Quincy Railroad Co.* v. *State*, 47 Neb. 549; 53 Am. St. Rep. 557; *First Nat. Bank of Mt. Vernon* v. *Sarlls*, 129 Ind. 201.

The cases in which the right to exercise the power has usually arisen, are cases in which the State or some municipal corporation to which the power had been delegated was asserting the power, and the party defending in such cases has been the one against whose conduct or property the power was sought to be enforced. The long list of authorities cited by counsel for appellee are of this class, among which is *Chicago and Northwestern Railway Co.* v. *City of Chicago*, *supra*, and which cases, as to the question here involved, have no application. While "the limit of the power cannot be accurately defined and the courts have not been able or willing definitely to circumscribe it," (*Pumpelly* v. *Green Bay Co.* 13 Wall. 166,) still the courts have generally found no great difficulty in determining whether or not it had been legally and reasonably exercised in a given case.

It seems to be thought by counsel for the city that inasmuch as the railroad company has been lawfully compelled to abandon its tracks on the street and so elevate them as to overcome the grade crossing, at great loss and expense to it, without compensation, neither should the plaintiff, who has suffered loss on account of the construction of the same work, be allowed to recover damages therefor. The position, upon first impression, seems plausible, but when carefully considered is clearly untenable. The relations of the parties to the city are entirely different. That which called for the exercise of

the police power by the municipality was the operation of the railroad in running its trains across the street. Neither the location nor use of the plaintiff's property endangered the public health or safety, and it must be admitted that if the city had attempted to interfere with that property by obstructing his access thereto under any claim of a police regulation, it would have been a flagrant abuse of the police power and no defense whatever to an action for the resulting damages. The plaintiff bears no relation to the railroad company. He had nothing to do with the operation of its road. He makes no claim in his declaration on account of the elevation of the tracks. His cause of action is against the city for so changing the grade of the street as to damage his property. Police power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society, but there is no particular magic or potency in the term. "Rights of property can not be invaded under the guise of the police power. All-embracing and penetrating as the police power of the State is and of necessity must be, *it is nevertheless subject, like all other legislative power, to the paramount authority of the State and the Federal constitution. A right conferred or protected by the constitution cannot be overthrown or impaired by any authority derived from the police power.*" (1 Dillon on Mun. Corp.—3d ed.—sec. 142.) It is undoubtedly true that the State, through the legislature, has the right to determine what shall be a reasonable exercise of the power, and so the municipal corporation, through its delegated power, may do so, but it cannot arbitrarily attribute the doing of a thing to the police power, whether reasonably done or not. It is a question finally for the courts to determine whether an act is within the police power. "There is a limit beyond which it cannot go and within which it will be confined by the judicial power of the State." Prentice on Police Power, 31; *Minnesota* v. *Barber*, 136 U. S. 313.

It is urged on behalf of the city that the making of the sub-way was merely incidental to the elevation of the tracks, and necessary in order that the railroad might reach its stations, etc. There is nothing in this record upon which to base that claim, and if there was, the fact could not justify the taking or damaging of the plaintiff's property without compensation. Suppose the railroad company had simply been ordered to elevate its road without any provision for the sub-way, and it had resisted the order upon the ground that the requirement was unreasonable or impracticable; could the city have compromised with it by changing the grading of the street, thereby damaging private property, and be exempt from liability for damages? Or, suppose that, in order to relieve the company of expense or inconvenience, the city had undertaken to change the location of the street, taking private property for that purpose; would it be claimed that as to the property holder such taking would be but a reasonable exercise of the police power? We certainly think not. It has been uniformly held by this court that any change in the grade of a street by which egress and ingress is obstructed to the private property of an owner is damaging private property for public use, within the meaning of section 13 of article 2 of the constitution of 1870. (*Rigney* v. *City of Chicago*, 102 Ill. 64; *Chicago and Western Indiana Railroad Co.* v. *Ayres*, 106 id. 511; *City of Bloomington* v. *Pollock*, 141 id. 346; *City of Joliet* v. *Blower*, 155 id. 414.) The rule thus uniformly announced has never been qualified or limited by the object or purpose which the municipality had in view in ordering the change. It is true that the term "police power" is not mentioned in the opinion of the court in these cases, nor, so far as we know, was it referred to in the briefs and arguments of counsel; but the question argued and decided in each of them was the liability of the city, under the foregoing clause of the

constitution, in making the change in the grade of the street, and it was in every case held that it was liable.

The case of *Frazer* v. *City of Chicago*, 186 Ill. 480, as well as cases cited by counsel to the effect that private property may be destroyed under the police power without compensation, in order to prevent the advance of an invading army or the spread of a conflagration, are clearly distinguishable from the case at bar. In the *Frazer case* there was no direct physical injury to the property of the plaintiff. His case was of the class referred to by Justice MULKEY in *Rigney* v. *City of Chicago*, where he says: "For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation of the value of neighboring property; yet that is clearly a case of *damnum absque injuria*." The constitutional guaranty against the taking of private property for public use had therefore no application whatever.

The right to destroy property in order to save it and other property from destruction by fire or the devastation of an army is a right which is frequently referred to the exercise of police power, but it is a right growing out of the immediate and pressing necessities of the occasion. It may be exercised by an individual as well as by the State or a municipal corporation. It grows out of the urgent public safety, and unless these conditions clearly appear the right does not exist. Dillon, in his work on Municipal Corporations, (sec. 955,) says: "The ground of this exemption from liability is the *public necessities*—the public good; and therefore, if the public good did not require the act to be done,—if the act was not apparently and reasonably necessary,—the actors cannot justify, and would be responsible." (See, also, *Field* v. *City of Des-Moines*, 39 Iowa, 575; 18 Am. St. Rep. 46, and authorities there cited.) In all such cases the emergency is such that no action can be taken for the purpose of condemning the property and ascertaining the damages in advance. No one will seriously contend that there was

an immediate and urgent necessity for the damaging of plaintiff's property, within the rule announced in any of the cases referred to.

We think the trial court properly refused to take the case from the jury and committed no error in giving said instruction.

The remaining grounds of reversal were heretofore considered and properly disposed of, as follows:

"It is urged the judgment should be reversed because of the rulings of the court restricting (as counsel for the appellant city urges) the expert opinion of the witness Brady as to the depreciation in the value of property 'by reason of the hard times,' to property within two or three blocks of appellee's premises. We have examined the testimony of this witness. The following extracts therefrom, as given in appellant's abstract, manifest the witness was not improperly restricted. The extracts are as follows: 'There has been a depreciation in the value of property throughout the city, by reason of what is called the panic of 1893, of from twenty-five to fifty per cent. It has depreciated that in that territory very much—north of Lake street more than it has in other localities. It has depreciated property on these streets that are parallel with Fortieth street very much. * * * I have property for sale in my hands three blocks from this property, east on Ayers avenue. That is a street paved with asphalt. The depreciation in the vicinity of the Jackson (appellee's) property is fifty per cent at least. The fair cash market value of that Jackson (appellee's) property before the change in the grade in 1895, —land and buildings,—I consider the building worth at that time about $5000. That property at the time had suffered a great depreciation from the panic. The land was worth, in my opinion, $50 a foot. The panic started the World's Fair year. I could not say whether it has stopped yet or not. Real estate appears to be going lower. The sales last year were less than the year be-

fore.' The suggestion of the court, made while this testimony was being heard, that the witness should limit his testimony to property within two or three blocks of the appellee's property, was rather for the purpose of requiring the witness to testify as to depreciation of property in the neighborhood of appellee's property, the witness having, before the suggestion was made, stated the per cent of depreciation of property generally in the city, and in specified portions of the city more or less remote from the Jackson property.

"Nor do we think the judgment should be reversed because of the rulings of the trial court as to the admissibility of evidence designed to be produced by a question propounded to one McLane, a witness for the city. The witness was introduced as an expert in the matter of real estate values. He expressed to the jury the opinion that the elevation of the tracks and the construction of the sub-way had added to the value of the appellee's property, and that such property had been increased in value thereby at least thirty per cent. He was then asked by counsel for the city, what, in his opinion, had been the effect, generally, upon property adjacent to other sub-ways in the city, and he stated it had been beneficial and had raised the market value of such property. The complaint is, the court declined to allow the witness to express his opinion as to the rate per cent of benefit to such other property upon each of many other different sub-ways along the line of the Illinois Central, the Lake Shore and the Rock Island railroads. There is no just ground of complaint of the action of the court in the examination of this witness.

"The trial court fell into error in respect of other rulings in the case, but upon a careful consideration we are inclined to agree with the Appellate Court that the judgment in the sum of $2000, as rendered, is well supported by competent testimony, and that such errors did not operate to the prejudice of the appellant city. Upon these

points the following portion of the opinion announced by the Appellate Court in the case is adopted, as giving expression to the views of this court:

"'Evidence was admitted tending to show what the extent of traffic was upon the east sidewalk of West Fortieth street compared to the traffic on the west sidewalk, and to show that, by reason of the change in the grade, traffic had been diverted from the east to the west side of the street. This testimony could only be proper in so far as it was, of necessity, brought out in discovering the elements upon which the experts based their opinions. It was not competent to show such temporary diversion of traffic as an element proper for the jury to consider in assessing damages, (*Hohmann* v. *City of Chicago*, 140 Ill. 226,) and so far as its admission may be said to have been for that purpose it was error. It was sought to cure the error indicated by an instruction given to the jury by the court, by which they were informed that the evidence as to traffic could only be considered for the purpose of arriving at a conclusion as to whether access to the premises of appellee had been interfered with by the change of grade. This is the instruction the giving of which constitutes one of the errors assigned and argued. We are of the opinion that the instruction failed to cure the error. The matter of the physical condition of the street and sidewalk and lot and building were all capable of direct and certain proof, without resort to proof dependent upon the action of the traveling public. Whether access was in fact cut off or impeded could be determined by a showing of the physical condition through witnesses and by the view of the premises which was had by the jury, without looking to the actions of persons passing upon the street and attempting to analyze their motives for taking the one sidewalk or the other.

"'Another error complained of was the admitting of evidence as to the number of trains which stopped at

the station at West Fortieth street, near the property in question, before and after the change of grade. This presented an element which the jury could not properly consider in assessing appellee's damages. * * *

"'Counsel for appellee were permitted, over objection, to cross-examine one expert as to his knowledge of the number of tenants in a building opposite to the property of appellee. It was not proper as a measurement of the damage to appellee's property. *Metropolitan West Side Elevated Railroad Co.* v. *White*, 166 Ill. 375. * * *

"'The only remaining question to be considered is as to whether the errors above indicated are such as should lead us to reverse the judgment and remand the cause for another trial. We are of opinion that they are not. It is beyond dispute that appellee's property has been put to a disadvantage and damaged by having the sidewalk and street in front of it lowered, the one to the extent of four feet and the other to the extent of eight feet. No amount of expert evidence would be likely to ever convince any jury that this did not effect a damage to the property. The witnesses who testify to values and extent of injury do not differ widely, except in the case of those who testify that there was no damage. Coe testified to damages amounting to $3500; Bogue estimated the damage at from $3500 to $4000; Snyder at $3400, and Cushing at $4000. The witnesses who testified simply to the cost of adjusting the building to the new grade of the street, fixed the cost at different sums. Marble at $2539.86, Holman at $2543 and Cook at $2529.35. Mace, a witness called by the city, testified as follows: 'Q. Mr. Mace, in your judgment, would it be the best thing for Jackson to lower his building lower than the sidewalk, down to the street level?—A. Well, I certainly would like it, if I owned it, that way, similar to across the street.' This witness testified that to lower the building to the sidewalk level only would not be 'a feasible changing of the building,' and that to lower it to

the street level, four feet below the sidewalk, which was the only feasible adjustment to the new conditions, would cost $2080.40.

"'We think it apparent from all the evidence that the property of appellee has been damaged, and that the verdict assessing that damage at $2000 was a fair and just ascertainment. Where substantial justice has thus been accomplished through the trial, and where it seems obvious that no decision more favorable to the appellant would result from another trial, it is not necessary, nor is it proper, that the judgment should be reversed because of the errors in procedure above indicated. *Newkirk* v. *Cone*, 18 Ill. 449; *Dishon* v. *Schorr*, 19 id. 59; *Schwarz* v. *Schwarz*, 26 id. 81; *New England Fire and Marine Ins. Co.* v. *Wetmore*, 32 id. 221; *Pennsylvania Co.* v. *Stoelke*, 104 id. 201; *Lebanon Coal and Machine Ass.* v. *Zerwick*, 77 Ill. App. 486; *Indiana and Illinois Southern Railway Co.* v. *Wilson*, id. 603.'"

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Afterwards, on June 5, 1902, upon considering a petition for a rehearing filed in this cause by the city of Chicago, appellant, the court, speaking through Mr. Justice HAND, announced the following additional oral opinion:

A petition for a rehearing has been filed in this cause on behalf of the city of Chicago, appellant. Two previous petitions for rehearing have been filed and duly considered by the court in this case,—one by the appellant and the other by the appellee,—both of which petitions were allowed by the court and rehearings of the cause actually had under them, respectively. Under the practice recognized and acted upon in this court, the same party is not permitted to have more than one petition for a rehearing in one and the same case. It is therefore ordered that the petition for a rehearing by the appellant be and the same is hereby stricken from the files.

Petition stricken.

HENRY H. GAGE
v.
THE CITY OF CHICAGO.

Opinion filed April 16, 1902—Rehearing denied June 5, 1902.

1. SPECIAL ASSESSMENTS—*when ordinance does not provide for two kinds of sidewalks.* An ordinance providing for a "cement sidewalk" does not provide for two kinds of walks because the sidewalk is further described as a "cement-concrete-sand-and-gravel" walk, since the term "concrete sidewalk" is a generic term, and the further description is merely a statement of the ingredients.

2. SAME—*when ordinance is not uncertain as to depth of sidewalk.* An ordinance is not uncertain as to the depth of a sidewalk which provides that the walk shall be laid to the grade of the street, which is established; that the foundation of the walk be the surface of the ground excavated or filled to within eight and one-half inches of grade; that there be a layer of cinders four inches deep, then a layer of cement and crushed stone four inches deep, and on top of that a finishing coat of cement one-half an inch in thickness.

3. SAME—*ordinance must be viewed as a whole.* An ordinance must be viewed as a whole, and one part or section may be referred to for the purpose of explaining another part or section.

4. SAME—*improvement resolution may be passed by a majority of the board.* The first resolution recommending a local improvement and the final resolution adopted after the public hearing may be adopted by a majority of the board of local improvements.

5. SAME—*section 7 of act of 1897 does not require ten days' notice of public hearing.* Section 7 of the Improvement act of 1897 is silent as to the number of days' notice of the public hearing required, and in view of the subsequent action of the legislature in fixing such time at five days, (Laws of 1901, p. 103,) six days' notice under the act of 1897 is not unreasonable.

6. SAME—*judgment entered after act of 1901 took effect should not include cost of making assessment.* A judgment of confirmation entered after the act of 1901 took effect is erroneous if it includes the cost of making and levying the assessment as provided by the ordinance and the engineer's estimate, even though the proceeding was begun before the act of 1901 took effect.

APPEAL from the County Court of Cook county; the Hon. R. H. LOVETT, Judge, presiding.

F. W. BECKER, for appellant.

ROBERT REDFIELD, for appellee.

Per CURIAM: This is an appeal from a judgment of confirmation by the county court of Cook county in a special assessment proceeding instituted by the city of Chicago to defray the cost of constructing a cement sidewalk six feet in width, on both sides of South Ridgeway avenue, from Douglas boulevard to West Twenty-sixth street. Appellant filed objections to the confirmation of the assessment, but the same were overruled and judgment was entered on July 10, 1901, confirming the assessment.

The ordinance providing for the improvement was passed on July 9, 1900, by the city council of Chicago. On January 11, 1901, the city of Chicago filed its petition in the county court praying that steps be taken to levy a special assessment for the improvement, and to the petition was attached a certified copy of the ordinance, together with a copy of the recommendation of the board of local improvements of the city and of the estimate of the cost of the improvement, as approved by the city council. The report and assessment roll were filed on May 7, 1901.

First—The first objection made by the appellant to the confirmation of the assessment is, that the ordinance does not specify the nature, character, locality and description of the proposed improvement, upon the alleged ground that the ordinance is uncertain and unintelligible as to the kind of sidewalk, the depth of the foundation, the mode of construction,—whether in front of the lots only, or at intersections,—and in excepting certain lots alleged to be not properly described.

It is charged against the ordinance that in one part of section 1 thereof it provides for a cement walk, and in another part for a cement-concrete-sand-and-gravel walk. As we read the ordinance this objection is without force. "Cement sidewalk" is a generic expression, and the further description contained in section 1 is merely a statement of the ingredients to be used in the construction of the cement sidewalk. The section does

not provide for the construction of two different kinds of sidewalks.

It is also claimed that the ordinance is uncertain and indefinite in describing the depth of the sidewalk. The ordinance reads as follows: "A foundation shall first be prepared, by cutting down or filling up the natural surface of the ground to within eight and one-half inches below the grade, which foundation shall consist of the surface of the ground as above prepared, upon which shall be laid a layer of cinders four inches in depth. On the foundation thus prepared there shall be placed a layer of hydraulic cement concrete four inches in thickness, composed of one part of cement, equal in quality to the best Portland cement, and two parts of the best, clean, coarse, sharp sand. After mixing said cement and sand dry, five parts of broken limestone crushed to a size so as to pass through a ring of two and one-half inches internal diameter shall be added thereto, and then water added in sufficient quantity as will give a surplus of moisture when rammed. Before the layer last described has set, a layer or finishing coat shall be placed thereon one-half inch in thickness, to be made of one part of cement, equal in quality to the best Portland cement, and one part of torpedo gravel." By reading the entire section of the ordinance it appears that there must be eight and one-half inches of filling to bring it to grade, as a layer of four inches of cinders is required, then a layer of four inches of hydraulic cement concrete is required, and upon that is laid a layer or finishing coat of cement one-half inch in thickness, making the walk eight and one-half inches in thickness. The ordinance further provides that "said sidewalk shall be laid to the grade of said South Ridgeway avenue between said points, which grade is hereby established as follows, to-wit." It will thus be observed that there is no indefiniteness as to the ingredients of the walk, or as to the distance between the foundation and the surface, or the thickness of the walk.

It is also charged against the ordinance that it is left uncertain by its terms whether the intention was that the walk should be built in front of the lots only, or also at intersections. There are many interlineations in the ordinance as it appears in the record, but the portion objected to under this head, when properly construed, reads as follows: "That a cement sidewalk six feet in width be constructed on both sides of South Ridgeway avenue, from the south line of Douglas boulevard to the north curb line of West Twenty-sixth street, adjoining the lot line in the said city of Chicago, (except across the rights of way of all steam railroads, and except across the roadways of all intersecting streets and alleys between said points, and except the intersections hereinafter described,) in front of the following described lots, blocks, tracks [tracts] or parcels of land." The words "adjoining the lot line" are not uncertain when read in connection with the entire context of the ordinance. When thus read they are perfectly intelligible.

It is also said that the ordinance is uncertain because it excepts certain lots, and among them "lots 1, 14 and 15, Bond's addition." The objection made to the description is, that as construed by appellant no block is given in which the excepted lots are located. An examination of the original record shows that this objection is without force, because the record describes lots 14 and 15 in block 1, and not lots 1, 14 and 15 without naming any block.

The ordinance must be viewed as a whole, and one part or section of it may be referred to for the purpose of explaining another part or section. (*McChesney* v. *City of Chicago*, 173 Ill. 75.) Looked at in the light of this rule of construction the first objection made to the ordinance by the appellant cannot be regarded as a valid one.

Second—The second objection insisted upon by appellant is, that the final resolution adopted by the board of local improvements was not adopted by the whole board,

but in the absence of two of the five members thereof. The record shows that a meeting of the board of local improvements for the purposes of a public hearing was held on January 24, 1900, and that three members of the board were present and two were absent. This court has recently held that the first resolution recommending the improvement, and the one adopted after the public hearing, adhering to such proposed improvement, may be passed by a majority of the board. (*Gage* v. *City of Chicago*, 192 Ill. 586; *Same* v. *Same*, 193 id. 108.) Here the final resolution was adopted by a majority of the board, hence the court below committed no error in overruling the second objection insisted upon by appellant.

Third—The third objection made by the appellant is, that the required statutory notice of the public hearing before the board of local improvements on January 24, 1900, was not given. The record shows that a regular meeting of the board of local improvements was held on January 10, 1900, at which all members were present. At that meeting an estimate furnished in pursuance of a former order of the board was approved, and upon motion of the secretary a resolution was adopted fixing Wednesday, January 24, 1900, at three o'clock P. M., in room 410 at the City Hall, as the time and place for the public hearing upon such resolution. On January 18, 1900, public notice by posting and mailing was given of the time and place of said public hearing. As only six instead of ten days intervened between the time of posting and mailing the notices of said public hearing and the time fixed for the holding of said public hearing, it is said the notice of said hearing was not sufficient and the board of local improvements was without jurisdiction to act. The statute (sec. 7 of the act of 1897) is silent as to the number of days' notice of the public hearing required, although it provides that the resolution shall be adopted ten days before the public hearing. By the act of 1901 the number of days' notice of the pub-

lic hearing is fixed at five, and that would seem to be reasonable and ample. The failure to fix the number of days in the act of 1897 for which said notice should be given was an evident oversight of the legislature, which it has remedied in the act of 1901, and as the time of such notice by the act of 1901 has been fixed at five days, that would seem to be a legislative construction of what would be deemed to be an ample and sufficient notice under the act of 1897, and as five days' notice of the time and place fixed for the public hearing would seem to be ample and reasonable, and a sufficient notice to enable all parties in interest to be present at such public hearing and to be heard in regard to the improvement proposed to be made, we are disposed to hold that the notice given in this case was sufficient.

Fourth—The fourth objection made by appellant is, that the assessment as confirmed includes the sum of $700.66 as cost for making and collecting the assessment. The engineer's estimate and the ordinance each provide that said amount shall be assessed as cost for making and collecting the assessment, and the petition filed by the city prays that the assessment be confirmed. It is therefore apparent that the cost of making and collecting the assessment was included in the judgment of confirmation. The proceeding for confirmation was commenced prior to the passage of the act of May 9, 1901, but the judgment of confirmation was not entered until after the act went into effect. Under the authority of *Kerfoot* v. *City of Chicago*, 195 Ill. 229, and *Gage* v. *City of Chicago*, id. 490, the including of the cost of making and collecting the assessment in the judgment of confirmation was erroneous, and said objection should have been sustained.

For such error the judgment of the county court will be reversed and the cause remanded.

Reversed and remanded.

THE CITY OF CHICAGO
v.
ESTHER G. LONERGAN.

Opinion filed April 16, 1902—Rehearing denied June 4, 1902.

1. PRACTICE—*verdict for plaintiff cures defective statement of cause of action.* A verdict in favor of the plaintiff cures defects in the statement of his cause of action, provided the cause of action is good.

2. PLEADING—*when declaration against city states a case.* A declaration against a city states a good cause of action which alleges plaintiff's ownership of property abutting upon a street, that the grade of said street had long been established and her buildings erected with reference thereto, and that the defendant changed the grade and permanently lowered it, making ingress and egress difficult and dangerous, and permanently damaging the property in its market value.

3. SAME—*declaration need not negative matters of defense.* A declaration against a city, in an action for damage to plaintiff's property from changing the grade of a street for the building of a sub-way, need not negative the idea that the property has been benefited by the improvement considered as a whole, since such fact is a matter of defense under the general issue.

4. EVIDENCE—*what competent in action for changing grade of street.* In an action against a city for damage to plaintiff's property from changing the grade of a street, the plaintiff may testify, as to the effect of the change with reference to her being able to get out of or in the building, that she had to build steps from the street.

5. SAME—*plaintiff may show that tenants moved out because grade of street was changed.* As affecting the market value of plaintiff's title to the property, even though the premises were leased, she may show, in an action for damages from changing the grade of the street, that in consequence of such change her tenants moved out and that the property was not rented.

6. SAME—*plaintiff may show that her property was in good repair.* In an action against a city for damage to plaintiff's property from changing the grade of a street, she may show that the property was in good repair, and may state the amount she had paid out for repairs a short time before the event.

7. INSTRUCTIONS—*when instruction as to effect of change of the street grade is not objectionable.* An instruction advising the jury that if they believed, from the evidence, that the rental value of the property had been diminished by the change in the grade of the street and cutting off ingress and egress, such fact might be considered in determining the question of the market value of the property,

is not objectionable because it makes no reference to the effect of the entire improvement.

8. DAMAGES—*both damages and benefits must be real and substantial.* As damages to property from a street improvement must be real and substantial, so benefits from the improvement must be such as affect the market value or use of the property and such as are capable of measurement.

9. TRACK ELEVATION—*city liable for damage from changing grade of street to build sub-way.* A city is liable for damage to private property from the change in the grade of the street on which it abuts, necessitated by the building of a sub-way under railroad tracks in obedience to a track elevation ordinance. (*City of Chicago* v. *Jackson*, *ante*, p. 496, followed.)

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

CHARLES M. WALKER, Corporation Counsel, and THOS. J. SUTHERLAND, for appellant.

WILLIAM M. & WILLIAM S. JOHNSTON, and CHARLES C. GILBERT, for appellee.

Per CURIAM: The Appellate Court for the First District affirmed a judgment recovered by appellee, against appellant, in the circuit court of Cook county, in a suit for damages to appellee's property by changing and lowering the grade of Forty-seventh street, in the city of Chicago, and impairing the means of access to the property from the street.

The plaintiff owns premises on the north-west corner of Armour avenue and Forty-seventh street, in front of which the grade was changed by the Lake Shore and Michigan Southern and Chicago, Rock Island and Pacific Railroad companies, under an ordinance of defendant requiring said companies to elevate their road-beds and tracks which crossed Forty-seventh street west of the plaintiff's property, and to change and lower the grade of Forty-seventh street so as to make a sub-way under

the tracks for the street. The change of grade and depression of Forty-seventh street began at the center of Armour avenue near the south-east corner of plaintiff's premises, where the depression was about ten inches. This depression became greater toward the west, and according to the plan was about four feet at the west end of the premises. The tracks were ordered to be elevated and the sub-way to be built for the purpose of abolishing a grade crossing of the street and tracks and the prevention of accidents and injuries to the public.

The first assignment of error which is argued by counsel is, that the declaration did not state a cause of action. The defendant demurred to the declaration, and its demurrer being overruled, filed its plea of not guilty, under which the trial was had, and where that is the case, only substantial defects can be availed of on appeal or error. When an entire verdict is given on several counts, it will not be set aside or reversed because of any defective count if one or more of the counts be sufficient to sustain the verdict. (Practice act, sec. 57.) After a party has pleaded to a declaration, if one or more of the counts be faulty he may apply to the court to instruct the jury to disregard such faulty count or counts, and it is the duty of the court to give such instruction. (Practice act, sec. 50.) Innate and substantive defects in a declaration are not cured by verdict, and if there are such defects, so that the declaration will not support the judgment, they may be taken advantage of on appeal or error; but only substantial defects can be so taken advantage of. In such a case, the verdict will aid a defective statement of title or cause of action, and the rule on that subject is: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue formed be such as necessarily required, on the trial, proof of the fact so defectively or imperfectly stated or omitted, and without which it is

not to be presumed the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." (1 Chitty's Pl. 673; *Keegan* v. *Kinnare*, 123 Ill. 280; *Chicago and Eastern Illinois Railroad Co.* v. *Hines*, 132 id. 161; *Chicago and Alton Railroad Co.* v. *Clausen*, 173 id. 100.) A verdict, however, will never assist a statement of a defective title or cause of action, and where no cause of action is stated the defect is not cured by verdict, and the objection may be availed of on error after a demurrer has been overruled and a defendant has pleaded over. The rule on that subject is this: "Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor, because 'to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated must be proved at the trial,' and it is therefore 'a fair presumption that they were proved.' But where no cause of action is stated the omission is not cured by verdict, for as no right of recovery was necessary to be proved or could have been legally proved under such a declaration, there can be no ground for presuming that it was proved at the trial." Gould's Pl. 463.

The objection made to the declaration in this case is, that it only charges the change and lowering of the grade of the street in front of plaintiff's property and the damage resulting therefrom, and fails to state the other acts of the defendant or the railroad companies which were connected with the change of grade as a part of the improvement. Counsel say that in determining whether damage has resulted to plaintiff's property all of the consequences of the entire improvement must be considered, and the only sufficient declaration would therefore be one which describes the whole improvement. The supposed objection does not appear by an inspection of the declaration, but only by an examination of the evidence con-

tained in the bill of exceptions. The declaration alleges the ownership by plaintiff of the premises bounded by Forty-seventh street; that the grade of said street had been long established and her buildings had been erected with reference to the grade, and that defendant changed the grade and permanently lowered it, making access to plaintiff's buildings and property, and egress therefrom, difficult and dangerous, and greatly and permanently damaging the property in its market value. This was a good cause of action. (*Rigney* v. *City of Chicago*, 102 Ill. 64.) The established rule is, that in determining whether damage has resulted to property from an improvement, a city has a right to have all benefits from the improvement offset against the alleged damages for changing the grade. That was a matter of defense proper to be proved under the general issue. The sufficiency of the declaration is determined by its contents, and not by going to a bill of exceptions for evidence that tracks were elevated or a grade crossing done away with so as to improve conditions where plaintiff's property was located. The assignment of error is groundless.

The next assignment of error argued relates to the admission of evidence. The court permitted the plaintiff, when testifying in her own behalf, to answer a question as to the effect of the improvement with reference to being able to get out or in the building. That was the very issue being tried, and the ruling was right. Her answer was, that she was left without any means of getting in or out, and that she had to put up steps from the street to the building. Counsel for defendant moved to strike out the answer as incompetent because it stated results. As the inquiry was what the effect of the change of grade was, and the answer stated the fact, it was proper. The plaintiff was then asked what effect cutting down the street had on the occupancy of the building. The question was objected to and the objection overruled. She answered that the tenants moved out; that they began

moving out after cutting down the street, and that after July 1, 1898, she did not have any tenants. The measure of damages in the case was the injury to the market value of the premises, which the evidence showed were kept for leasing, and the market value of such property depends upon having tenants. It was proper to show that in consequence of cutting down the street the tenants left and the premises were not rented, as affecting the market value. Counsel say that the plaintiff had no present title or interest in the premises because they were leased. She received the rents, and if the premises could not be rented because the access was cut off it would affect the market value of the title which she held.

On cross-examination it appeared that plaintiff owned other buildings in the city, located several miles away, on North Clark street, and she testified that rents, generally, had not been as good since 1895 as they were before. Being interrogated about her building on North Clark street, she said that she got $400 or $500 a year less than before. Counsel for defendant then insisted upon knowing the precise amount she was receiving as rent for the building on North Clark street. The court sustained an objection, and was right in doing so. The only relevancy of the evidence was to show that rents in the city, generally, had fallen off since before the street was cut down. Counsel says he was denied a full cross-examination, and wanted to pursue the inquiry because plaintiff might answer untruthfully as to the amount she was receiving and he would be able to raise a question as to her veracity. That is not a good reason, and the court ruled correctly.

The court refused to strike out a statement of plaintiff, on cross-examination, as to her buildings. She said they were in good repair and had been repaired in the summer of 1890, when she spent $2300 on them. The evidence was competent, as tending to show the value of the property.

Again, it is complained that the court refused to allow cross-examination of one of the plaintiff's witnesses testifying as to the value of the property, as to whether he had any connection with any property for sale in the vicinity. The cross-examination was very lengthy and covered the business experience of the witness, and ranged all over the city of Chicago. He had testified that he had been in the real estate business in Chicago since 1891, and that he had been employed by a number of large real estate firms. It had already become pretty clear what the extent of his knowledge was, and while there would have been no harm in allowing the witness to answer the question, there was no reversible error in the ruling. Cross-examination is largely in the discretion of the trial court, and in this instance it had already gone to the greatest lengths.

It is next argued that the court erred in giving the ninth instruction asked by the plaintiff. That instruction told the jury that if they believed, from the evidence, that the rental value of the property in question had been permanently decreased or diminished by reason of the lowering of the grade of the street and cutting off the ingress and egress, it was a proper fact or circumstance to be taken into consideration in determining the question of market value of the property and the amount thereof. Counsel admit that rental value was one fact which tends to prove fair cash market value, which was the ultimate fact to be found by the jury, and we see no objection to the instruction. The chief objection seems to be that it ignores the effect of the entire improvement, and that it should have told the jury that they should take into account any increase in rental value in determining the question of benefit to the market value. It was not necessary to present both sides of the case in the instruction, and the plaintiff had a right to an instruction presenting the law applicable to her theory. The instruction did not assume any fact or single out

evidence and present it to the jury, and was not objectionable on either of those grounds.

It is also claimed that the tenth instruction given at the request of plaintiff ignored the effect of the entire improvement, but the instruction twice refers the jury to the effect of the improvement, taken as a whole, upon the property.

Counsel object to the second instruction given at the request of the plaintiff, and the modification of the third instruction asked by the defendant and given as modified by the court. Said second instruction and the modification of the third excluded from consideration benefits common or general to the public, which were incapable of measurement, conjectural or speculative, when applied to the property alleged to be damaged. The rule stated was correct. Damages must be real and substantial, and benefits must be such as affect the market value or use of the land and such as are capable of measurement. *Metropolitan West Side Elevated Railway Co.* v. *Stickney*, 150 Ill. 362.

The court refused an instruction asked by the defendant, that it was not liable for any damages for the construction of the sub-way in the exercise of its police powers, and gave an instruction asked by plaintiff, permitting her to recover if her property was damaged by changing the grade over and above any benefit derived from the elevation of the tracks and the whole of the improvement, although it was urgent and necessary, for the safety of the public, to elevate the tracks at the crossing of Forty-seventh street, and that by so elevating them a great benefit was conferred upon the public. In *City of Chicago* v. *Jackson*, (*ante*, p. 496,) we have considered the question whether the city is liable for damages under such circumstances, and have held that damages occasioned by such an improvement are within the provision of the constitution that private property shall not

be damaged for public use without just compensation. That decision is conclusive of the question raised and argued by counsel with reference to these instructions.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE ILLINOIS IRON AND METAL COMPANY

v.

WILLIE WEBER.

Opinion filed April 16, 1902—Rehearing denied June 4, 1902.

1. INSTRUCTIONS—*instruction directing verdict under certain conditions must state the conditions correctly.* If the court gives an instruction directing a verdict if the jury should find certain facts to be true, the instruction must embrace all the facts and conditions essential to such verdict.

2. INFANTS—*age is not the only element involved in the exercise of due care.* In an action by a minor for injuries, an instruction authorizing a verdict for the plaintiff if the jury believe he was injured in consequence of defendant's negligence "while in the exercise of ordinary care for *a boy of his age*," is erroneous, since his intelligence, experience and ability to care for himself are also elements to be considered upon the question of care.

3. SAME—*newsboy riding on a wagon must use reasonable care for his safety.* While a newsboy has a right to ride on a wagon with the driver's consent, yet he must use reasonable care for his safety; and it is a question of fact whether he was guilty of negligence in riding on the tail-board of the wagon, where other teams followed, traveling on the car tracks, where it was difficult to turn out.

4. DAMAGES—*when an instruction on subject of damages is erroneous.* An instruction which invites the jury to speculate upon the possibility of permanent disability, without any evidence whatever that such a result is probable, is erroneous.

MAGRUDER, J., dissenting.

Illinois Iron and Metal Co. v. *Weber*, 89 Ill. App. 368, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES A. BISHOP, Judge, presiding.

KERR & BARR, for appellant.

JOHN F. WATERS, and C. H. JOHNSON, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee recovered a judgment for $1475 in the circuit court of Cook county against appellant for a personal injury. The evidence at the trial was, in substance, as follows: Plaintiff was a newsboy, between eleven and twelve years old, and his stand was at Dearborn and Monroe streets, in the city of Chicago. He was going from his home, about four miles distant, to his place of business. At Twenty-second street and Blue Island avenue, by permission of the driver, he got on a wagon loaded with brick. He did not take a seat with the driver or upon the load, but stood up on the rear of the wagon behind the box and held on to the hind end-gate of the wagon. As the wagon went north on Halsted street it was one of a procession of loaded teams in a street car track. The next wagon behind was owned by the defendant and loaded with five tons of metal. The brick wagon stopped at a street crossing to allow a street car to pass, and the wagon of defendant was about ten feet behind. The testimony for plaintiff was that defendant's driver made no attempt to stop until close to the brick wagon, when he pulled his horses up. The evidence for defendant was that the brick wagon backed up. At any rate, defendant's team, in attempting to stop or in pulling back, raised the end of the pole above the platform where the boy stood. When moving along or standing still the pole hung low, but when the horses pulled back on the chains attached to the end it was raised, and the end of the pole struck the calf of plaintiff's leg, inflicting a flesh wound which required seventeen stitches. Plaintiff was taken to the county hospital and stayed there from Friday until the next Wednesday. He was confined to his bed at home for about six weeks

and walked on crutches about six weeks. It was more than three months after the accident before he could go to work. At the time of the trial he was accustomed to walk four miles every day from his home to his place of business down town. He had been in the paper business since he was nine years old, and had been in the habit of riding down town on wagons.

Plaintiff requested the court to give to the jury, and the court gave, the following instructions, purporting to present the law applicable to his case:

"If the jury believe and find, from the evidence, that plaintiff, while in the exercise of ordinary care for a boy of his age, was injured by and in consequence of the negligence of the defendant, as charged in the declaration, then you should find the defendant guilty.

"If you believe and find, from the evidence, that plaintiff was exercising ordinary care for a boy of his age, and that the wagon of defendant which struck plaintiff could have been stopped by the driver of the defendant in charge of the wagon, by the exercise of ordinary care on his part, in time to prevent injuring the plaintiff after he (the driver) became aware or might have become aware (by the exercise of ordinary care) of plaintiff's imminent danger of being struck by said wagon, then you should find the defendant guilty.

"The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of his damages.

"In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and in mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evi-

dence before them in this case, he has sustained or will sustain by reason of such injuries; any loss of time and inability to work and earn a livelihood for himself after he attains the age of twenty-one (21) years, if any, which the jury may believe, from the evidence, he will sustain on account of such injuries, and may find for him such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration."

These were all the instructions given at the request of the plaintiff or assuming to state the grounds upon which a recovery could be had. The first two instructions each directed the jury to find the defendant guilty, provided they should believe, from the evidence, the existence of certain facts. One of the essential facts which the law required to be found was that the plaintiff was in the exercise of ordinary care for his own safety, and each of those instructions informed the jury that the fact was proved if he was in the exercise of ordinary care for a boy of his age. They directed the jury to return a verdict for the plaintiff if they found he was in the exercise of ordinary care for a boy of his age and the defendant was negligent and the injury resulted. That was not a correct rule of law, since the question of care was not to be determined alone by the plaintiff's age, but also from his intelligence, experience and ability to understand and comprehend dangers and care for himself. The case was one in which the defendant was entitled to correct instructions upon that question. It was a question whether plaintiff was not guilty of negligence in riding where he did, in a procession of teams, outside of the box, behind the end-gate of the wagon. The position was a dangerous one, not provided or used for passengers or intended for such use. Plaintiff had a right to ride on the wagon with the driver's consent, but it

was his duty to use reasonable care for his own safety. There was a string of heavily loaded teams in the car tracks, where it was difficult, if not impossible, to turn out, and the difficulty and danger in stopping when one of a procession stops is matter of common knowledge. Cases cited as to the liability of common carriers of passengers where a car is full and a passenger rides upon the platform have no bearing on this question. Passengers are accustomed to be upon platforms and are sometimes compelled to ride there, and different rules are applied to a common carrier from those governing parties not in that relation. There was no necessity whatever for the plaintiff assuming the position that he did. These facts were not controverted or in dispute, but are gathered from his own testimony. If the damage to the plaintiff was caused by his own negligence in assuming such a position he could not recover. In determining that question his age was to be taken into account, but it could not be said, as a matter of law, that he was too young to exercise any care for his personal safety or that he was incapable of negligence. Unquestionably, he was capable of exercising some degree of judgment and discretion and some degree of care for his own safety. He had lived in the city and been engaged in business and was accustomed to ride on wagons. Judge Thompson, in his Commentaries on Law of Negligence, (vol. 1, sec. 309,) says: "Two lads of equal age and natural capacity, one of them raised in the country and the other in the city, might approach a given danger, and the one would be perfectly competent to care for himself while the other would be helpless in the face of it. Therefore the capacity, the intelligence, the knowledge, the experience and the discretion of the child are always evidentiary circumstances—circumstances with reference to which each party has the right to introduce evidence, which evidence is to be considered by the jury." The rule established by our own decisions is, that age is not

the only element to be considered, but that intelligence, capacity and experience are also to be taken into account. (*Weick* v. *Lander*, 75 Ill. 93; *City of Chicago* v. *Keefe*, 114 id. 222; *Illinois Central Railroad Co.* v. *Slater*, 129 id. 91.) The error was not cured by any instruction in the case, and could not be. It has always been held that where the court directs a particular verdict if the jury should find certain facts, the instruction must embrace all the facts and conditions essential to such a verdict. It is not required that one instruction shall state all the law, and instructions may supplement each other and supply defects, but where an instruction directs a verdict upon certain conditions it must state the conditions correctly. Even where instructions may supplement each other, each one must state the law correctly as far as it goes, and they should be in harmony, so that the jury may not be misled. They are not able to select from contradictory instructions one which correctly states the law. It is obvious that where the jury were told to find the defendant guilty if they found that plaintiff was in the exercise of ordinary care for a boy of his age, even if some other rule was given in another instruction, it would be impossible for the jury to decide which one to follow and impossible for us to determine which one they did follow. The jury were told to find defendant guilty if they found certain facts, and the defective instructions were not cured by others. *Quinn* v. *Donovan*, 85 Ill. 194; *Illinois Linen Co.* v. *Hough*, 91 id. 63; *Wabash, St. Louis and Pacific Railway Co.* v. *Rector*, 104 id. 296; *Wabash, St. Louis and Pacific Railway Co.* v. *Shacklet*, 105 id. 364; *Hoge* v. *People*, 117 id. 35; *Gorrell* v. *Payson*, 170 id. 213.

The last of the above instructions was the only one given on the question of damages, and it directed the jury, in determining the amount of plaintiff's damages, to take into consideration any loss of time and inability to work and earn a livelihood for himself after he attains the age of twenty-one years, if any, which the jury may

believe, from the evidence, he will sustain on account of such injuries. There was no evidence on which to base that part of the instruction. The plaintiff was between eleven and twelve years old when he was hurt, and it would be between nine and ten years before he would reach the age of twenty-one. The wound was quite extensive, but his stocking was not broken or torn. The wound had healed, leaving a considerable scar, and the plaintiff was in the habit of walking down town four miles every day. He was then fifteen years old and said that the leg still hurt him if he walked far. No one testified as to probabilities for the future, and there was nothing which would justify a conclusion that plaintiff would be unable to work and earn a livelihood six years later. To invite the jury, by an instruction, to speculate on the bare possibility of permanent disability, without any evidence whatever that such a result was probable, was wrong. The instructions given at the request of the plaintiff were all erroneous.

The judgments of the Appellate Court and the circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

Mr. JUSTICE MAGRUDER delivered the following dissenting opinion:

As the Appellate Court says in its opinion: "The theory of defense was that the brick wagon, upon which appellee was riding, suddenly backed up so as to bring the appellee's leg in contact with the pole of appellant's wagon, and without fault of appellant's driver. The theory of appellee was that the brick wagon was stopped and was standing still, when the driver of appellant's wagon negligently proceeded until the pole of the wagon struck appellee." The evidence was conflicting. A part of the testimony sustained the theory of the appellant, and a part of it sustained the theory of the appellee. It was a question of fact, and as there is evidence tending

to support the cause of action, such question of fact is settled by the judgments of the courts below.

First—At the conclusion of the appellee's case, and again at the conclusion of all the testimony, counsel for appellant, upon the trial below, asked the court to give to the jury a peremptory instruction to find the appellant not guilty. This instruction was refused, and its refusal is assigned as error. The refusal of the peremptory instruction is claimed to have been error upon the alleged ground that the fact, that the boy was riding upon that part of the brick wagon which projected some fourteen inches beyond the tail-board, constituted negligence *per se*. The question, whether the boy was in the exercise of ordinary care for his own safety when he was injured, was a question of fact to be determined by the jury. The fact, that he was riding upon the tail-board of the wagon, instead of sitting upon the brick with which the wagon was loaded, or upon the front seat with the driver, was a circumstance, which the jury had a right to take into consideration in determining whether or not appellee was in the exercise of ordinary care for his own safety, but, under the decisions of this court, that circumstance did not conclusively establish negligence on appellee's part, as matter of law. In *North Chicago Street Railroad Co.* v. *Baur*, 179 Ill. 126, it appeared that a passenger on a street car left his seat, and went upon the platform of the car, from which he was thrown by the sudden starting of the car, and the question was raised whether or not he was guilty of negligence in so leaving his seat and going upon the platform, but that was held to be a question of fact for the jury under all the facts and circumstances.

In *Gibbons* v. *Vanderhoogt*, 75 Ill. App. 106, it was held that it was a question for the jury to determine what care should be exercised by a boy fourteen years of age, who was injured while sitting on the rear end of a wagon and directly in front of another wagon, and that the fact

of his sitting in the place named could not be held to constitute negligence *per se.* In answer to a special interrogatory submitted to the jury by appellant upon the trial below, the jury made a special finding to the effect that the plaintiff was at the time of the injury in question in the exercise of ordinary care and caution.

Second—It is assigned as error that the court refused to give the first of the instructions tendered by the appellant. This instruction contained the following words: "The jury are instructed that the mere fact, that the wagon of the defendant was proceeding at a distance of not more than five or six feet from the brick wagon, is not of itself evidence of negligence on the part of the defendant company." The refusal of this instruction was not error, because it was a question of fact for the jury whether or not the defendant below was guilty of negligence, and it was improper to single out any particular circumstance, and call such circumstance to the attention of the jury, as establishing negligence or as failing to establish negligence. It was for the jury to determine under all the circumstances, whether the conduct of appellant's driver was negligent or not.

In answer to special interrogatories, submitted to the jury by the appellant, the jury specially found that the driver of appellant's wagon was negligent in the management of its team and wagon; that the injury to appellee could have been avoided by the exercise of ordinary care and prudence on the part of the driver of appellant's wagon; that the team, which drew appellant's wagon, had not been brought to a stop before the collision which caused the injury to appellee; and that the collision was not caused by the backing of the brick wagon moving toward the south.

Third—It is further assigned as error, that the court refused to give an instruction, asked by the appellant, which conditioned the right of the plaintiff to recover upon the belief by the jury from the evidence that the

appellee, plaintiff below, had sufficient age and sufficient intelligence and experience to properly understand and comprehend the risk he took in occupying the seat, which he did occupy upon the rear end of the wagon. There was no error in refusing this instruction, for the reason that the principle, embodied in it as above stated, was sufficiently set forth in the second instruction, which was given for the appellant at its request.

Fourth—It is assigned as error that the court gave an instruction for the plaintiff below, which conditioned the right of the plaintiff to recover upon the belief and finding of the jury from the evidence, "that plaintiff was exercising ordinary care for a boy of his age," etc. The objection to this instruction is, that it should have conditioned the right of recovery upon the belief and finding of the jury from the evidence that plaintiff was exercising ordinary care for a boy, not merely of his age, but also of sufficient capacity and experience to comprehend the risk, which he ran in riding upon the tail-board of the wagon. The claimed defect in the instruction was obviated and remedied by the second instruction above referred to, which was given for the appellant at its request. The second instruction so given is as follows:

"If the jury believe from the evidence in this case that the plaintiff, at the time of the injury complained of, had sufficient age and sufficient intelligence and experience to properly comprehend and understand the risks he took in jumping on to the rear end of a passing wagon and thus remaining and riding, then you are instructed that the law charges him with the same responsibility for his conduct as if he were of full age, and that want of ordinary care on the part of the plaintiff, if shown by the evidence, would be a complete defense to his suit, the same as if he were of full age."

Fifth—It is further assigned as error that the court below gave an instruction, at the request of appellee, which mentioned, among the elements of damage for which re-

covery might be had, "any loss of time and inability to work and earn a livelihood for himself, after he attains the age of twenty-one (21) years, if any, which the jury may believe from the evidence he will sustain on account of such injuries."

A correct disposition is made of this assignment of error by the Appellate Court in their opinion where they say (89 Ill. App. 368):

"It is argued that there was no evidence in the case, upon which the jury could reasonably base a belief that there would be any such loss of time or inability after the appellee attained his majority. It is true that no medical expert testified that the injury to appellee was a permanent injury, nor that it would be likely to continue to affect appellee for any specified length of time. Nevertheless, the jury might, from the evidence in the case, have properly concluded that the injury was a permanent one, or that it would continue to cause loss of time and inability to work after appellee had attained his majority. Appellee testified that the leg was cut open to the bone; that seventeen stitches were taken in sewing up the wound; that he was upon crutches for six weeks after the injury, and was not able to go to work for more than three months. He also testified that, at the time of the trial, the leg still troubled him when he walked 'far;' that he then was obliged to sit down and rest; and that it did not seem to be getting better in that respect. Another witness testified that 'the leg was split open about four or six inches, gashed to the bone,' etc. The injured limb was exhibited to the jury. We cannot say that the jury might not, from this evidence, have reasonably concluded that the injury was permanent, and would occasion some degree of incapacity for labor after appellee reached the age of twenty-one, if he lived to that time."

I do not think that there is any error in this record which would justify me in voting to reverse the judgment of the Appellate Court.

LUC DANDURAND
v.
THE COUNTY OF KANKAKEE.

Opinion filed April 16, 1902—Rehearing denied June 5, 1902.

1. COUNTIES—*county court has jurisdiction of suit in assumpsit by the county.* The county court has jurisdiction of an action of assumpsit brought by the county to recover for the support of an insane person, where the damages are laid at $1000.

2. SAME—*insane person of means is liable to the county for support at the county asylum.* An insane person of means and having no one dependent upon him for support, who is returned by the State authorities to the county and is kept by it in the county insane asylum for a period of years with the knowledge of his conservator, is impliedly liable to the county for his support, care and medical attention furnished to him by the county during such period.

3. SAME—*intention to charge does not enter into case where support is furnished by county.* If an insane person is liable, under the law, for his support and necessaries furnished by the county, the fact that the county officers had not made a special charge against him, and had taken no steps to compel him to pay until a year or two before bringing suit, does not release the insane person from liability, upon the ground that the county did not intend to charge for such support prior to the demand, since no officer of the county could form such an intention so as to bind the county.

Dandurand v. *County of Kankakee*, 96 Ill. App. 464, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the County Court of Kankakee county; the Hon. EBEN B. GOWER, Judge, presiding.

The Appellate Court makes the following statement:

"This was a suit brought by the county of Kankakee against Luc Dandurand for his board, lodging, support, care and medical treatment in the Kankakee county insane asylum, a department of its poor house. The declaration contained five counts. Defendant filed a plea to the jurisdiction of the court. A demurrer to this plea was sustained. The plea was amended, and demurrer

again sustained to it. Defendant then demurred to the first four counts of the declaration. This demurrer was sustained as to the first and second counts and overruled as to the third and fourth. Defendant pleaded the general issue and the five years' Statute of Limitations to the third, fourth and fifth counts. A trial was had without a jury. Defendant presented eight propositions of law. The court held the seventh and refused the others. The court found for plaintiff in the sum of $520 and rendered judgment therefor."

Defendant prosecuted his appeal, his conservator executing the appeal bond in his name, to the Appellate Court, where the judgment was affirmed, and this appeal is prosecuted from such judgment of affirmance, a certificate of importance having been granted.

GRANGER & GRANGER, for appellant.

W. J. BROCK, and B. L. COOPER, State's Attorney, for appellee.

Per CURIAM: In deciding the case, the Appellate Court, in its opinion, expresses the following views:

"*First*—It is argued the court erred in sustaining the demurrer to the amended plea to the jurisdiction. The position taken is, that the county court does not have jurisdiction of a suit brought by the county. Reliance is had upon section 31 of chapter 34 of the Revised Statutes. That section restricts the courts in which suit against a county may be brought, but contains no such restriction in cases of suits brought by a county. The county bringing a suit may resort to any court having jurisdiction of the subject matter in the county where the defendant resides. The action was assumpsit and the damages were laid at $1000. The county court had jurisdiction of such a case. We find no error in sustaining the demurrer to said plea. Defendant also argues the court erred in over-

ruling his demurrer to the third and fourth counts of the declaration, but by thereafter pleading to said counts upon the merits demurrer was waived.

"*Second*—On February 6, 1888, Dandurand, in proper proceedings in the county court, was adjudged insane and ordered committed to a State hospital for the insane, and he was then placed in the State insane hospital at Kankakee. On August 19, 1893, the superintendent of the Kankakee county poor farm and insane asylum, acting, as he testified, under orders either from the State asylum or the county clerk, but which he did not remember, went to the State asylum and took Dandurand therefrom and brought him to the county insane asylum, where he has ever since remained and been cared for by the county at public expense, except that his conservator paid for his clothing. The discharge book of the State asylum states his condition when he left as 'stationary.' While his then conservator did not know of the removal at once, both he and the present conservator did learn of it soon after it occurred, and more than five years before this suit was begun. Neither side proved the special circumstances under which the State authorities returned Dandurand to the county authorities. Section 17 of chapter 85 of the Revised Statutes authorized the superintendent of the State hospital to return quiet, harmless, chronic patients to the counties from which they were sent, under certain circumstances, and we must presume this officer discharged his duty, till the contrary appears. But, irrespective of that, this patient was returned to the county authorities. He was in need of board, care and medical attention, and was obviously unfit to be at large, and the county furnished him that care. His conservator knew the facts and did not offer to provide for him elsewhere or take any steps to have any change made. We are of opinion defendant was impliedly liable for these necessaries so furnished him. Dandurand had an estate amounting, at the time of the trial, to about $2500. It

appears from the proofs that no one was dependent upon him for support, and that no one is entitled to anything from said fund but Dandurand himself. Section 17 of chapter 86 of the Revised Statutes requires the conservator to apply the income and profit of his ward's estate, so far as may be necessary, to the comfort and suitable support of his ward. Speaking of statutes then in force similar to our present statute relative to paupers, the court, in *City of Alton* v. *County of Madison*, 21 Ill. 114, said that to become a public charge a person must be poor and unable to earn a livelihood, and be without any of the enumerated relatives of sufficient ability for his support; that a person having sufficient means for his own support was not within the provisions of the law making his support a public charge; that there can be no reason why the public should be charged with the support of a person having ample means for that purpose, and that to support him as a public charge, where he has ample means, would not be just; that an insane person having property adequate to his support is not a pauper, and consequently the county is not liable for his support. It is true, the questions discussed there arose in a different way from what they do here. There the city of Alton had supported an insane person possessed of property and sued the county to recover therefor. But the principles there laid down are of a general character. If Dandurand had been a pauper his relatives would have been liable to the county for his support, under the provisions of chapter 107 of the Revised Statutes, entitled 'Paupers.' How can it be said that because he has means both he and his relatives are exonerated and the county must bear the charge? We are satisfied the court below correctly held him liable.

"*Third*—It is urged that as the county officers had not made a special charge against him, and had taken no action to compel him to pay till a year or two before this suit was brought, the county is not entitled to recover

for support prior to that time, as it is presumed the county intended not to charge for said support prior to that time. We think the intention does not enter into the case where the support is by a public body. If he was liable for his own support under the law, there was no officer who could form an intention that gratuitous service should be rendered, which would bind the county and release defendant from liability. Nor can such intention be manifested by a failure to inaugurate some system of book-keeping and of making charges against the insane patient, nor by a failure of the county officers to promptly ascertain and enforce the legal rights of the county.

"*Fourth*—The proof was that the services rendered were reasonably worth two dollars per week, and this was not controverted, and the court allowed two dollars per week for the five years preceding the commencement of the suit. The proof showed the mere dieting of the inmates of the county insane asylum cost the county less on the average than that sum. This is immaterial, for that is not all defendant received. He had his lodging, medical attention and nursing, and such supervision and control as he might require by reason of his insanity, and upon this record we think he has no cause to complain of the moderate sum allowed.

"The action of the court upon the propositions of law was in harmony with the views herein expressed. The judgment is affirmed."

We concur in the foregoing views, and in the conclusion reached by the Appellate Court. The judgment of the Appellate Court is, accordingly, affirmed.

Judgment affirmed.

PHILO A. OTIS

v.

THE PEOPLE *ex rel.* S. B. Raymond, County Treasurer.

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. TAXES—*what necessary to authorize recovery of taxes illegally collected.* To warrant a recovery from a municipality of taxes which have been illegally collected and paid over, the tax must have been illegal and void, paid under compulsion or what would be equivalent thereto, and received to the use of the municipality from the collecting officer.

2. SAME—*payment of taxes to prevent sale is not under compulsion.* A payment of illegal taxes to prevent a sale of the real estate is not under compulsion, but is regarded as voluntary.

3. SAME—*effect of voluntary payment of illegal taxes.* One who voluntarily pays illegal city taxes with full knowledge of all the facts cannot recover them back, nor can he have them set off against a school tax sought to be collected by a sale of the property.

4. SAME—*specification of school taxes as for "building purposes" and "educational purposes" is sufficient.* The statute having authorized a school tax levy for "building purposes" and for "educational purposes," the appropriation and tax levy ordinances are sufficiently definite if they specify the amounts required, respectively, for "building purposes" and for "educational purposes."

5. SAME—*what a sufficient description of property for taxation.* Any description by which property can be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient to sustain a tax levy; and the owner is bound by the description where he files a petition with the board of review to obtain a reduction of valuation, in which he employs the same description as that by which the property was assessed and taxed.

6. CONSTITUTIONAL LAW—*constitution does not require that number of section amended be specified.* The constitution does not require that the number of the section of the act to be amended be specified in the amendatory act, and hence if the subject matter of the act to be amended is expressed in the title of the amendatory act and the section amended is inserted at length therein, the fact that the wrong section number is given in the amendatory act does not render the amendment invalid, if there is no uncertainty as to what section was intended to be amended.

7. SAME—*amendment of School law by act of April 21, 1899, not invalid.* The act of April 21, 1899, purporting by its title to amend section 202 of article 8 of the School law of 1889 by permitting the levy of

a two and one-half per cent tax for educational purposes and the same for building purposes, instead of a two per cent tax for the former and a three per cent tax for the latter, is not invalid because the number "202" is inadvertently used for the number "1."

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

TAYLOR & MARTIN, for plaintiff in error:

The provisions in the City and Village act requiring the appropriation and tax levy ordinances to specify in detail the purposes for which the tax is levied are inserted for the information and benefit of the tax-payer. The tax must show upon its face that the money is to be raised and applied to some legal object and purpose. *Sank* v. *Philadelphia*, 4 Brewst. 133; *English* v. *People*, 96 Ill. 566; *State* v. *Sallman*, 37 N. J. L. 156; *State* v. *Sullivan*, 36 id. 89; *People* v. *Railway Co.* 116 Ill. 410; *Spring Valley Coal Co.* v. *People*, 157 id. 543.

The words "building purposes," as used in the statute, refer especially to the building of school houses, while the words "educational purposes" apply to all other matters for which school taxes may be levied. *Railway Co.* v. *People*, 187 Ill. 289; *O'Day* v. *People*, 171 id. 293; *Knopf* v. *People*, 185 id. 20; *Railroad Co.* v. *People*, 163 id. 616.

The provisions in the statute requiring the appropriation and tax levy ordinances to set out the objects and purposes for which the tax is levied, and specify the same in detail, are mandatory. The power of the taxing authorities in such a case is limited by the manner and conditions prescribed for its exercise. The donee of such power should be held to the strict execution because of the liability of the power to abuse and the fact that it may result in the divestiture or transfer of property. *Sanderson* v. *LaSalle*, 57 Ill. 441; *Riverside Co.* v. *Howell*, 113 id. 256; *Chicago* v. *Blair*, 149 id. 310; *Drummond* v. *Cox*, 165 id. 648; *French* v. *Edwards*, 13 Wall. 506; *Chicago* v. *Wright*, 32 Ill. 192; *Butler* v. *Nevin*, 88 id. 575.

An act which attempts to amend a prior act by a section number which has no existence is invalid and void. *Kepley* v. *People*, 123 Ill. 367; *Railway Co.* v. *East St. Louis*, 134 id. 656; *Goodall* v. *People*, 123 id. 389; *Palmer* v. *Danville*, 166 id. 42.

Where payments are made upon an indebtedness, part of which is legal and part illegal, and a portion remains unpaid, in an action to enforce payment of said remainder the law will apply the payments made on the legal portions, leaving the illegal unpaid. *Saylor* v. *Daniels*, 37 Ill. 331; *McCormick* v. *Nichols*, 19 Ill. App. 334; *Mitchell* v. *Lyman*, 77 id. 525; *Fowler* v. *Trust Co.* 141 U. S. 406.

The payment of taxes is not different from any other payment. Payment may be proven by parol, like any ordinary debt, and a receipt is subject to explanation or contradiction by parol evidence. *Rand* v. *Scofield*, 43 Ill. 167; *Parish* v. *Lewis*, 85 id. 597; *Sholl* v. *Coal Co.* 139 id. 21.

In proceedings for taxation the property must be described by reference to government surveys or by metes and bounds, or if it is divided into lots, then by reference to authenticated plats. *Sanford* v. *People*, 102 Ill. 374; *Mix* v. *People*, 116 id. 278; *People* v. *Green*, 158 id. 594; *People* v. *Dragstran*, 100 id. 286; *People* v. *Rickert*, 159 id. 496; *Upton* v. *People*, 176 id. 634; *Vennum* v. *People*, 188 id. 158.

EDWIN W. SIMS, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for defendant in error:

The State, county, city, library, sanitary and park taxes, respectively, were each voluntarily fully paid by plaintiff, on his own motion, three months prior to the application of the collector for judgment for the unpaid school tax, which application for judgment was for the unpaid school tax only; and these taxes so voluntarily paid cannot be recovered by him in any proceeding, nor can their legality be questioned in this proceeding, nor a recovery had indirectly by an application upon the un-

paid school tax. *Walser* v. *Board of Education*, 160 Ill. 272; *Elston* v. *Chicago*, 40 id. 514; *Swanston* v. *Ijams*, 63 id. 165; *People* v. *Miner*, 46 id. 374; *Falls* v. *Cairo*, 58 id. 403.

Any description by which the property may be identified by a competent surveyor with reasonable certainty, with or without the aid of extrinsic evidence, will be sufficient. Rev. Stat. chap. 120, secs. 58, 62, 63, 66, 68; *Law* v. *People*, 80 Ill. 268; *Fowler* v. *People*, 93 id. 116; *People* v. *Stahl*, 101 id. 346; *Greenwood* v. *LaSalle*, 137 id. 225.

The school taxes were levied in accordance with the provisions of the statute. The act authorizing a levy of an amount not exceeding two and one-half per cent of the assessed value for building purposes and two and one-half per cent for educational purposes is valid, and the levy coming within these limitations is likewise valid. *Speight* v. *People*, 87 Ill. 600; *Kinnare* v. *Chicago*, 171 id. 332; *Fuller* v. *Heath*, 89 id. 296; *Smith* v. *People*, 154 id. 58; Laws of 1898, p. 54; Laws of 1899, p. 350; *Railroad Co.* v. *People*, 143 Ill. 434; *School Directors* v. *School Directors*, 73 id. 249.

The assessment meets all the requirements of the law, and the remaining unpaid tax should be sustained. *Mix* v. *People*, 116 Ill. 265; *Thatcher* v. *People*, 79 id. 597; *Buck* v. *People*, 78 id. 560; *Garrick* v. *Chamberlain*, 97 id. 620; *Lyle* v. *Jacques*, 101 id. 644; *Swinney* v. *Beard*, 71 id. 27; *Railway Co.* v. *People*, 171 id. 249; *Chiniquy* v. *People*, 78 id 570.

Mr. JUSTICE HAND delivered the opinion of the court:

This is a writ of error to review a judgment for sale of certain real estate of the plaintiff in error located in the city of Chicago, rendered by the county court of Cook county for the delinquent school tax levied thereon for the year 1900, over the objections of the plaintiff in error. Taxes aggregating the sum of $7896.08 were levied on said real estate for that year, and on April 27, 1901, the plaintiff in error voluntarily paid to the county collector the State, county, city, library, sanitary district and South Park taxes in full, leaving unpaid thereon only

the tax levied for school purposes, which is for the sum of $3419.73, and for which amount, only, the county collector applied for judgment and order of sale.

It is first contended by plaintiff in error that a part of the city tax paid by him was invalid on the ground that the city of Chicago, at the time of the levy thereof, was indebted beyond the five per cent limit, as provided in section 12 of article 9 of the constitution, and it is urged that in case it should be found that any part of the school tax is valid, so much of the city tax as is found to be invalid should be applied in payment of the school tax, and that judgment should be rendered for only so much of the school tax as remains unpaid after the application of the city tax already paid by him which is found to be invalid. The plaintiff in error voluntarily paid to the county collector the city tax with a full knowledge of all the facts, and the same cannot be recovered back by him, neither can it be offset against the school tax sought to be collected in this proceeding. (*Elston* v. *City of Chicago*, 40 Ill. 514; *People* v. *Miner*, 46 id. 374; *Falls* v. *City of Cairo*, 58 id. 403; *Union Building Ass.* v. *City of Chicago*, 61 id. 439; *Swanston* v. *Ijams*, 63 id. 165; *Chicago, Burlington and Quincy Railroad Co.* v. *People*, 136 id. 660; *Walser* v. *Board of Education*, 160 id. 272.) In *Walser* v. *Board of Education*, *supra*, on page 276 it is said: "Money paid voluntarily by one with knowledge or means of knowledge of all the facts cannot be recovered back. (*Elston* v. *City of Chicago*, 40 Ill. 514; *Town of Lyons* v. *Cook*, 9 Ill. App. 543.) To recover from a municipality taxes illegally collected and paid over, the tax must have been illegal and void, paid under compulsion, or what would be equivalent thereto, [and] received to the use of the municipality from the collecting officer. (*Elston* v. *City of Chicago*, *supra*; *Railroad Co.* v. *Commissioners*, 8 Otto, 541; *Preston* v. *City of Boston*, 12 Pick. 15.) The tax in this case was illegal and void, and received from the collecting officer by and for the use of the municipality, as appears from the averments of this bill. This

would not be sufficient, but it must further appear the payment was compulsory. A payment made to prevent the sale of real estate for an illegal tax is not under compulsion, but must be regarded as voluntary.—*Stover* v. *Mitchell*, 45 Ill. 213; *Falls* v. *City of Cairo*, 58 id. 403; *Swanston* v. *Ijams*, 63 id. 165."

It is next contended that the school tax is invalid for the reason that the city council of the city of Chicago did not pass an appropriation ordinance and tax levy ordinance, as provided by section 2 of article 7 and section 1 of article 8 of the City and Village act, specifying in each of said ordinances the purposes, in detail, for which said school tax was to be used. It appears that the board of education of the city of Chicago on March 22, 1900, transmitted to the mayor and city council, in pursuance of the resolution of said board, the following requisition for school purposes for the year 1900, the same being an estimate by said board of education of the amount to be provided in the tax levy for 1900 for school purposes:

FOR BUILDING PURPOSES.

New buildings, sites and permanent improvements		$2,500,000
Parental school building		200,000
Total		$2,700,000
Loss in collection		160,000
Total		$2,860,000
Educational purposes	$7,450,000	
Less estimated revenue from other sources	750,000	
Leaves a balance of		$6,700,000
Loss in collection		450,000
Total		$7,150,000
Bonded indebtedness and interest		166,000

It further appears that on April 4, 1900, an appropriation ordinance was passed by the city council and approved by the mayor, making appropriations for corporate, school and public library purposes for the fiscal year from January 1, 1900, to December 31, 1900, which had incorporated therein the estimate of the board of

education of said city in substantially the same form that it was transmitted to the mayor and city council, and that on April 23, 1900, a tax levy ordinance was passed by the city council and approved by the mayor, whereby the sum of $18,384,195.36 was levied and assessed on all the real and personal property within the city for the current fiscal year, which had incorporated therein the estimate of said board of education in substantially the same form that it was transmitted to the mayor and city council, and which contained a direction to the city clerk to file a certified copy thereof with the county clerk of Cook county on or before the second Tuesday of August, 1900.

It is provided by section 1 of article 8, chapter 122, (Hurd's Stat. 1899, p. 1555,) that "for the purpose of establishing and supporting free schools, * * * repairing and improving school houses, * * * and for all other necessary incidental expenses in each district, village or city, anything in any special charter to the contrary notwithstanding, the directors of such district and the authorities of such village or city shall be authorized to levy a tax annually upon all the taxable property of the district, village or city * * * for educational and * * * for building purposes." By virtue of this statute the city is authorized to establish and support free schools, and for such purposes may levy a tax for educational and building purposes, and the statute having provided for a tax levy for "educational purposes" and "building purposes," and the appropriation and tax levy ordinances each having substantially specified the purposes for which the school tax in question was to be used, in the language of the statute, viz., "educational purposes" and "building purposes," we think said ordinances sufficiently definite in that particular.

It is further contended that the tax levy for educational purposes being more than two per cent of the taxable property of the city of Chicago as equalized by the State Board of Equalization for the year 1900, such ex-

cess cannot be collected, and in support of such contention it is said the various attempts of the legislature to amend the law increasing the right of taxation, for which a tax levy for educational purposes may be made, from two to two and one-half per cent, are illegal, and therefore a tax for educational purposes for more than two per cent cannot be levied. By section 1 of article 8 of "An act to establish and maintain a system of free schools," approved and in force May 21, 1889, a tax levy of two per cent for educational and three per cent for building purposes was authorized. On February 24, 1898, at a special session of the legislature, (Laws of 1898, p. 54,) an act was passed entitled "An act to amend an act entitled 'An act to establish and maintain a system of free schools,' approved and in force May 21, 1889." Section 1 of said act reads as follows: "Be it enacted by the People of the State of Illinois, represented in the General Assembly: That section 202 of an act entitled 'An act to establish and maintain a system of free public schools, approved and in force May 21, 1889,' be amended to read as follows:" Then follows section 2, which is section 1 of article 8 of the act of 1889 as amended, the only change made in the section as it stood in the act of 1889 being the addition thereto of the following proviso: "*Provided*, that the proper authorities in cities of over 100,000 inhabitants shall be authorized to levy a tax annually upon all taxable property of such city of not to exceed two and one-half per cent for educational and two and one-half per cent for building purposes, the valuation to be ascertained as hereinbefore provided."

In 1899 the legislature passed two acts upon the subject,—one on April 12, 1899, and one on April 21, 1899. The title and first section of the act of April 12, (Laws of 1899, p. 350,) are as follows:

"An act to amend article 8, section 202, of an act entitled 'An act to establish and maintain a system of free schools,' approved and in force May 21, 1889.

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That article 8, section 202, of an act entitled 'An act to establish and maintain a system of free schools,' approved and in force May 21, 1889, be, and the same is hereby, amended so as to read as follows:"

Then follows section 2, which is a re-enactment of section 1 of article 8 as it stood prior to the amendment of February 24, 1898, with the exception that a tax levy of two and one-half per cent for educational and two and one-half per cent for building purposes was authorized, instead of two per cent for educational and three per cent for building purposes.

The act of April 21, 1899, which is the last act passed by the legislature, is in part as follows:

"An act to amend section 202, article 8, of an act entitled 'An act to establish and maintain a system of free schools,' approved May 21, 1889, and as the same is amended by an act approved February 24, 1898.

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That section 202, article 8, of an act entitled 'An act to establish and maintain a system of free schools,' approved and in force May 21, 1889, and as the same is amended by an act approved February 24, 1898, be amended to read as follows:

"Sec. 202. For the purpose of establishing and supporting free schools for not less than six nor more than nine months in each year, and defraying all the expenses of the same of every description, for the purpose of repairing and improving school houses, of procuring furniture, fuel, libraries and apparatus, and for all other necessary incidental expenses in each district, village or city, anything in any special charter to the contrary notwithstanding, the directors of such district and the authorities of such village or city shall be authorized to levy a tax annually upon all the taxable property of the district, village or city not to exceed two and one-half

per cent for educational and two and one-half per cent for building purposes (except to pay indebtedness contracted previous to the passage of this act), the valuation to be ascertained by the last assessment for State and county taxes: *Provided*, that in cities having a population exceeding 100,000 inhabitants the board of education may establish and maintain vacation schools and play grounds under such rules as it shall prescribe."

The act of 1889, as passed by the legislature, contains no section 202, that number being the number subsequently given to section 1 of article 8 of the act of 1889 by Starr & Curtis in the second edition of their annotated statutes, and which evidently misled the legislature, and caused it, in the various amendments to section 1 of article 8 of the act of 1889, to refer to said section as section 202. Said section 1 of article 8 of chapter 122 as found in the statute as originally passed, and section 202 of chapter 122 as found in Starr & Curtis, is the same section. We think the number 202, as used in the various amendments of said section 1 of article 8 of the act of 1898, may be regarded as surplusage and as wholly immaterial in determining whether the act of April 21, 1899, amending section 1 of article 8 of chapter 122, is now in force. The constitution nowhere provides that the section of an act sought to be amended shall be indicated. It requires that the subject matter of the act sought to be amended shall be expressed in the title of the amendatory act and that the section amended shall be inserted at length in the new act. In the amendatory act of April 21, 1899, both of these constitutional provisions are fully complied with. The subject matter of the act sought to be amended is fully stated in the title and the section sought to be amended is inserted at length in the new act. There is, therefore, no uncertainty in the act of April 21, 1899, as to what section of chapter 122 of the Revised Statutes the legislature, by the new act passed upon that date, intended to amend, and where the inten-

tion of the legislature can be ascertained with absolute certainty courts will carry such intention into effect and hold the amendment valid. *Illinois Central Railroad Co.* v. *People*, 143 Ill. 434.

It is also contended that the descriptions of parts of said premises as set forth in the delinquent list, judgment record and collector's warrant are so defective as to invalidate said tax. The tracts are described as lot 1 in assessor's division of block 62, canal trustees' subdivision of the west half of section 27, township 39, range 14, town of South Chicago, county of Cook and State of Illinois; also the south eleven feet of sub-lot 4, and all of sub-lot 5, in assessor's division of lots 7 and 8, block 54, original town of Chicago, in section 27, township 39, range 14, town of South Chicago, county of Cook and State of Illinois. On the hearing, two plats were introduced in evidence and three witnesses were called by the defendant in error, all of whom were by occupation and long continued service shown to be practicing surveyors, who testified from the descriptions given and the plats shown them they could identify and locate the tracts in question. The plaintiff in error was also called and examined as a witness, and testified that the first tract was located on the south-east corner of Indiana avenue and Twenty-fifth street, in the city of Chicago; that it was improved; that it has a frontage of 66⅔ feet on Indiana avenue and 188.1 feet on Twenty-fifth street, and that the second tract has a frontage of 38 feet on Wells street, (now Fifth avenue,) in the city of Chicago, and a depth of 80.75 feet, and that it is covered by a single improvement, consisting of a four-story brick building known as Nos. 128 and 130 Fifth avenue, which descriptions correspond with the plats. The plaintiff in error appeared before the board of review of Cook county and sought to obtain a reduction in the valuation placed upon said tracts by the board of local assessors for the year 1900, and filed with said board of review a petition in writing

asking for such relief, in which petition he employed the same descriptions which were used in making the assessment and tax levy on said tracts for that year. It also appeared that said tracts had been assessed to plaintiff in error by said descriptions and the taxes levied thereon paid by him for the ten years preceding the year 1900.

Any description by which property can be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient to sustain a tax levy. (*Law* v. *People*, 80 Ill. 268.) The tracts in question were assessed in the name of the plaintiff in error, and the plats introduced in evidence, with the plats of the original subdivisions of the portions of the city in which they are located, respectively, in connection with the testimony of the plaintiff in error, made the descriptions of said tracts full, complete, definite and accurate, and so certain that any competent surveyor could readily have located the same as the property assessed, and that is sufficient. When the plaintiff in error appeared before the board of review that body had power to correct the descriptions of said tracts, if wrong. As the plaintiff in error made no complaint that they were improperly described, but described the same in his petition to said board in accordance with the descriptions by which they had been assessed by the board of local assessors, which descriptions were shown by the recorded plats thereof then on file in Cook county for the purposes of said assessment, he voluntarily acknowledged said plats, and as the evidence shows he is the owner of said tracts, and there is no claim that they have been assessed to any one else or that the school tax levied thereon for the year 1900 has been paid, he must be held bound by the assessment. *Law* v. *People*, *supra*; *Colcord* v. *Alexander*, 67 Ill. 581.

We find no reversible error herein. The judgment of the county court will therefore be affirmed.

Judgment affirmed.

THE OGDEN BUILDING AND LOAN ASSOCIATION
v.
ANNA MENSCH *et al.*

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. PLEADING—*when admission in answer is not binding.* An allegation in the answer to a bill to foreclose a loan association mortgage, that the defendants executed, "as security for said loan, a bond and mortgage, copies of which are annexed as exhibits to said bill of complaint," is not an admission that defendants had waived their estate of homestead in a legal manner, although both the mortgage and acknowledgment contain a clause releasing homestead, where the answer further alleges that defendants did not, in and by said mortgage, release or waive their homestead.

2. PRACTICE—*when an objection that allegation is a statement of legal conclusion cannot prevail.* An objection that an allegation in an answer to a bill to foreclose a mortgage is but a statement of a legal conclusion cannot be urged on appeal, where no objection was made to the introduction of evidence before the master tending to support such allegation, and no objections or exceptions to the master's report were made upon that ground.

3. HOMESTEAD—*what essential to create lien on homestead.* It is essential to the creation of a lien upon the homestead estate of the mortgagors, that it appear from the certificate of acknowledgment that the mortgagors acknowledged to the officer taking the acknowledgment that they have waived and relinquished their estate of homestead in the mortgaged premises.

4. MORTGAGES—*acknowledgment taken by stockholder in corporation mortgagee is void.* An acknowledgment of a mortgage to a loan association, taken by a notary public who is a stockholder in the association, is void because of his financial interest in the debt secured, and the mortgage is inoperative as to the homestead estate of the mortgagors in the mortgaged premises, but it is binding except as to the homestead estate where its execution is proved by competent evidence, independently of the acknowledgment.

5. SAME—*an acknowledgment of mortgage to corporation may be taken before officer who is not a stockholder.* An acknowledgment of a mortgage to a corporation may be taken before a notary who is a director, officer or agent of the corporation but not a stockholder.

6. SAME—*effect, as to notice, where certificate of acknowledgment is void.* If the disqualifying interest of the officer who took the acknowledgment of a mortgage is not apparent upon the face of the mortgage or certificate, the recording of the mortgage is constructive notice of the mortgage to the extent of the lien created thereby.

Ogden Building Ass. v. *Mensch*, 99 Ill. App. 67, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

JOSEPH H. MUHLKE, and SAMUEL B. KING, for appellant:

A certificate of acknowledgment is not void by reason of the fact that it was taken and certified by a stockholder of the mortgagee corporation, who was also the attorney and director thereof. *Cooper* v. *Building Ass.* 97 Tenn. 285; *Bank* v. *Conway*, 1 Hughes, 37.

The qualification, as to disinterestedness, of a notary public taking and certifying to an acknowledgment is not the same as the qualification of a judge or juror. *Lynch* v. *Livingston*, 6 N. Y. 422.

The act of a notary public taking and certifying to an acknowledgment of a deed is purely ministerial, and not judicial or *quasi* judicial. 1 Jones on Mortgages, (2d ed.) sec. 535; *People* v. *Bartels*, 138 Ill. 322.

An interested officer may perform a valid ministerial act with reference to a transaction in which he is interested. Throop on Officers, secs. 607, 614; 12 Am. & Eng. Ency. of Law, 49.

The act of an interested officer taking and certifying to the acknowledgment of a deed is valid, if no imposition is by him practiced upon the grantors, and void if imposition is practiced. *Cooper* v. *Building Ass.* 97 Tenn. 285.

Since the acknowledgment is valid upon its face, and appellees did not offer to pay appellant what they received under the mortgage, they cannot be relieved from the *prima facie* effect of the acknowledgment, because a party seeking equity must offer to do equity. *Hayes* v. *Building Ass.* 124 Ala. 663; *Grider* v. *Mortgage Co.* 99 id. 281.

The admission by appellees Mensch that the mortgage in question was executed and delivered carries with it the admission that the instrument was properly acknowl-

edged, because, since the statute requires an acknowledgment to convey the homestead, an instrument assuming to convey the homestead is not a mortgage thereof, nor does it possess any legal efficacy in relation thereto unless so acknowledged. *Parrott* v. *Kumpf*, 102 Ill. 423; *Gage* v. *Wheeler*, 129 id. 197.

Where the statute requires acknowledgment as a condition precedent to the validity of any part of an instrument the acknowledgment is a part of the execution of the instrument. *Mariner* v. *Saunders*, 5 Gilm. 113; *Mettler* v. *Miller*, 129 id. 630; *Mason* v. *Brock*, 21 id. 273; *Joseph* v. *Doherty*, 60 Cal. 358; 11 Am. & Eng. Ency. of Law, (2d ed.) 584; Anderson's Law Dict. 429.

The effect of the admission is not avoided by the denial in another part of the answer that the homestead passed, since that is a conclusion of law. *Union Coal Co.* v. *LaSalle*, 136 Ill. 119; *Kay* v. *Churchill*, 10 Abb. (N. C.) 83.

Where a certificate of acknowledgment is regular upon its face, as is the certificate in this case, an attack upon its validity for interest of the officer can only be raised by a direct proceeding showing grounds for cancellation. *Monroe* v. *Arthur*, 28 So. Rep. 476.

E. J. BATTEN, and D. K. TONE, for appellees:

An acknowledgment of a mortgage taken by an officer adversely interested is void. *Hammers* v. *Dole*, 61 Ill. 310; *Armstrong* v. *Combs*, 44 N. Y. Sup. 173; *Bank* v. *Rosenthal*, 99 Cal. 39; *Building Ass.* v. *Groves*, 96 Va. 138; *Workman's Aid Ass.* v. *Monroe*, 53 S. W. Rep. 1029; *Hayes* v. *Building Ass.* 26 So. Rep. 527; *Kothe* v. *Krag-Reynolds Co.* 20 Ind. App. 293; *Leonhard* v. *Flood*, 56 S. W. Rep. 781.

Prior to the statute abolishing the disability of witnesses a stockholder was incompetent to testify in behalf of the corporation of which he was a member, and can not now testify where the disqualification has not been removed, and therefore could not act as attesting witness for his corporation. *Consolidated Ice Machine Co.* v.

Keifer, 134 Ill. 481; 26 Ill. App. 468; *Thrasher* v. *Railroad Co.* 25 Ill. 393; *Winsted Savings Bank* v. *Spencer*, 26 Conn. 196; *Christiansen* v. *Towing Co.* 75 Ill. App. 267; *Ryder* v. *Railroad Co.* 13 Ill. 516.

It is not necessary that the officer taking the acknowledgment should be a party to the instrument to disqualify him from certifying to its acknowledgment. *Groesbeck* v. *Seeley*, 13 Mich. 329; *Workman's Aid Ass.* v. *Monroe*, 53 S.W. Rep. 1029; *Miles* v. *Kelly*, 40 id. 599; *Kothe* v. *Krag-Reynolds Co.* 20 Ind. App. 293; *Hayes* v. *Building Ass.* 124 Ala. 663; *Smith* v. *Clark*, 69 N.W. Rep. 1011; *Building Ass.* v. *Groves*, 96 Va. 188.

Even should the answer be held defective, appellant has waived its right to take advantage thereof by not excepting to the answer, (*Scanlan* v. *Scanlan*, 134 Ill. 630; *Stark* v. *Brown*, 101 id. 395; *Stone* v. *Moore*, 26 id. 165;) and by not objecting for that reason before the master and filing exceptions to the report in the superior court. *McClay* v. *Norris*, 4 Gilm. 370; *Brockman* v. *Aulger*, 12 Ill. 277; *Prince* v. *Cutler*, 69 id. 267; *Pennell* v. *Lamar Ins. Co.* 73 id. 303; *Brainard* v. *Hudson*, 103 id. 218.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The appellant association exhibited in the superior court of Cook county a bill in chancery praying for the foreclosure of a real estate mortgage executed by the appellees Anna and Michael Mensch, husband and wife, to secure a loan in the sum of $3000. Appellee George Landgraf held a mortgage on the same property, subsequently executed by the same mortgagors, to secure an indebtedness in the sum of about $300, and he was for that reason made a party defendant to the bill. He filed a cross-bill praying for the foreclosure of his mortgage. The mortgaged premises were the homestead of the mortgagors. On the hearing the chancellor ascertained and declared the amounts due the mortgagees, respectively, (as to which there was and is no controversy,) but ruled

that the lien of the mortgage given to the appellant association, though superior in point of date of execution and of recording to that of said Landgraf, did not attach, as did the lien of the mortgage to Landgraf, to the homestead estate; decreed foreclosure of both mortgages and that the mortgaged premises be sold by the master, and directed that out of the net proceeds of the sale the sum of $1000, being the value of the homestead estate, should be appropriated first, so far as necessary, to the payment of the mortgage indebtedness due to the appellee Landgraf, and that the remainder of said sum of $1000 should be paid to the appellees Anna and Michael Mensch, the mortgagors, and that the appellant association should be paid the net proceeds of the sale in excess of said $1000, so far as necessary to discharge the indebtedness due to it. The Appellate Court for the First District affirmed the decree, and the appellant association has perfected a further appeal to this court.

The mortgage given to the appellant association was acknowledged before Joseph H. Muhlke, a notary public. The said Muhlke, at the time he made the certificate that the mortgage was acknowledged before him by the said mortgagors, was the holder and owner of ten shares of the capital stock of the appellant association. He was also, at the same time, a member of the board of directors of the appellant association and was its attorney. The certificate of acknowledgment is in compliance with the provisions of sections 26 and 27 of chapter 30 of the Revised Statutes, entitled "Conveyances," and contains a clause stating that the mortgagors, and each of them, waived and relinquished all right of homestead in the mortgaged premises. In the body of the mortgage there is a clause to the effect that the mortgagors waived their right of homestead. The decree entered by the chancellor, and the affirmance thereof by the Appellate Court, were on the ground that the acknowledgment was void for the reason the notary who certified to the acknowl-

edgment was a stockholder in the association to whom the mortgage was given, and was, therefore, pecuniarily and beneficially interested in the indebtedness intended to be secured by the mortgage.

The answer of the mortgagors contained the admission that they had executed and delivered to the appellant association, "as security for said loan, a bond and mortgage, copies of which are annexed as exhibits to said bill of complaint." It is contended that the word "executed" denotes all acts of execution, including the acknowledgment of the mortgagors, and therefore this admission necessarily includes the admission that the acknowledgment to the mortgage was valid and effectual. The answer, however, further states "that defendants did not, in and by said mortgage, release or waive their right of homestead." The bill contained no express averment as to the sufficiency and legality of the acknowledgment, and the admission, especially when considered together with the further statement of the answer explicitly denying that the homestead right had been waived, cannot be regarded as an admission the respondents had waived the estate of homestead in a binding and legal manner.

It is next complained the statement in the answer "that defendants did not, in and by their said mortgage, release or waive their rights of homestead," is a mere averment of a legal conclusion, and did not warrant the introduction of evidence. On the hearing before the master to whom the cause was referred, the appellee mortgagors, without objection on the part of the appellant or suggestion of a variance, introduced testimony to prove the facts necessary to establish the existence of the homestead estate in the mortgaged premises, and to show that the notary public who certified to the acknowledgment was at the time a stockholder in the appellant company, a member of its board of directors and its attorney, and other facts which they relied upon to establish the

defense that the mortgage did not have the effect, in law, to release or waive their right of homestead. The master, in his report, found, and reported as findings of fact, that the appellee mortgagors were, at the time of the execution of the mortgage, and also at the time of the report, occupying said premises as a homestead; that the notary who took the acknowledgment was at the time a stockholder in the mortgagee association and was then financially interested in the indebtedness to be secured by the mortgage, and reported as a conclusion of law arising out of such facts that in his opinion the acknowledgment was void. The appellant association did not, in the single objection filed to the report of the master, question the propriety of the action of the master in receiving the testimony referred to, but objected only to the correctness of the legal conclusion reached by the master from the facts established by the proof, that the acknowledgment was ineffectual to create a lien upon the estate of homestead. If the appellant regarded the averments of the answer as but a mere legal conclusion and insufficient to warrant the introduction of evidence, it should have filed exceptions to the answer, or on the hearing before the master should have objected to the admission of the evidence tendered for the purpose of proving facts upon which rested that which the appellant regarded as but a mere legal conclusion. Again, opportunity to prefer that objection was offered on the coming in of the master's report. Had any such timely objection been made by the appellant association the objection might have been obviated by an amendment of the answer. Having tried the case precisely as if the defense that the notary public was disqualified to take the acknowledgment, and that for that reason the acknowledgment was void, had been formally and technically pleaded, the appellant association cannot be permitted to shift its position and urge in this court, for the first time, objections which might have been obviated had

they been preferred in the trial court. *Cheltenham Improvement Co.* v. *Whitehead*, 128 Ill. 279; *Brainard* v. *Hudson*, 103 id. 218; *Gehrke* v. *Gehrke*, 190 id. 166; *Consolidated Coal Co.* v. *Wombacher*, 134 id. 57.

The principal object to be effectuated by the creation of the homestead estate is to protect the householder and his family in the enjoyment of a home and to secure them a shelter beyond the reach of his improvidence or financial misfortune. Considerations of sound public policy affecting the general interest were involved and contributed to the enactment of the statute by which the estate is created. Having established the specific estate for such beneficent purposes, the General Assembly deemed it essential, as a further protection to those entitled to enjoy the benefits of the estate, that the estate should not be held to pass or be lost by the mere ordinary modes of conveyance, and in this view enacted section 27 of chapter 30 of the Conveyance act, which provides that in order to be effectual to alien or encumber the homestead estate the instrument executed to accomplish either purpose must contain a clause in the body thereof, and also in the certificate of acknowledgment, expressly releasing or waiving such estate. In *Gage* v. *Wheeler*, 129 Ill. 197, we said: "It has been repeatedly held by this court, under statutes prescribing the mode in which the homestead exemption or estate might be released, waived or conveyed, that to make such release, waiver or conveyance effectual, as against the person entitled to the exemption or estate, the requirements of the statute, both as to the terms of the deed and the acknowledgment, must have been complied with." In *Leonard* v. *Crane*, 147 Ill. 52, we said (p. 57): "By the Conveyance act it is requisite that in the deed there shall be contained a clause waiving the right of homestead, and a similar clause must be contained in the acknowledgment of both the husband and wife, and the estate of homestead thus created can be relinquished only in the

mode pointed out by the statute, or by abandonment." In each of the cases from which we have quoted many other decisions of this court, all to the same effect, are cited. If, then, the notary public who certified to the acknowledgment to the mortgage in the case at bar was for any reason so disqualified or incompetent in law to take and certify to the acknowledgment of the mortgagors that they waived or relinquished the homestead that such acknowledgment is without legal effect, it is clear the chancellor and the Appellate Court correctly held that the mortgage was without efficacy to create a lien upon the estate of homestead in the premises.

The notary public was a stockholder in the association to whom the debt intended to be secured by the mortgage was payable. He was financially interested in the collection of the indebtedness to the association in proportion the value of his shares of stock in the association bore to its entire capital stock. He was directly financially interested in the validity of the lien of the mortgage on the homestead estate of the mortgagors. In the case of *Association* v. *Spencer*, 26 Conn. 195, the court said: "A stockholder in a private corporation is interested in all its transactions, and, of course, in every conveyance to and from it. As the assets of the corporation are increased or diminished, his stock, which is representative of a portion of the assets, is of more or less value." Morawetz, in his work on Private Corporations, (sec. 231,) says, that in incorporated companies the real parties in interest are the individual stockholders. In *Consolidated Ice Machine Co.* v. *Keifer*, 134 Ill. 481, and in *Albers Commission Co.* v. *Sessel*, 193 id. 153, we declared a stockholder was interested to such an extent as to disqualify him to testify in behalf of the corporation in an action against the representatives of a deceased person.

It was essential to the creation of a lien on the estate of homestead of the mortgagors that it should appear from the certificate of acknowledgment that the mort-

gagors had acknowledged to the officer taking the acknowledgment that they waived and relinquished their right or estate of homestead in the mortgaged premises. In 1 Cyc. p. 553, it is said: "Because of the probative force accorded to the certificate as well as the usually important consequences of the instrument itself, public policy forbids that the act of taking and certifying the acknowledgment should be exercised by a person financially or beneficially interested in the transaction. * * * It is the general rule that an acknowledgment taken before an interested person is void for all purposes and cannot be reformed or corrected." In a note to the text many authorities are cited in support thereof. In 1 Am. & Eng. Ency. of Law, (2d ed.) p. 493, the conclusion announced is, it is a general rule that an officer who is a party to a conveyance or interested therein may not take the acknowledgment of the grantor, and this declaration of the general rule is supported by many adjudicated cases cited in the note thereto. It has been held that an acknowledgment of an instrument taken before an officer who is a party to the instrument, or is interested, beneficially, therein, is a void acknowledgment, by the courts of last resort in Virginia, (*Davis* v. *Beasley*, 75 Va. 491; *Bowden* v. *Parrish*, 86 id. 67; *Iron Belt Building and Loan Ass.* v. *Groves*, 96 id. 138;) California, (*Merced Bank* v. *Rosenthal*, 99 Cal. 39;) Maine, (*Bearman* v. *Whitney*, 20 Me. 413;) Iowa, (*Bank* v. *Radtke*, 87 Iowa, 363; *Wilson* v. *Traer*, 20 id. 231; *Smith* v. *Clarke*, 69 N. W. Rep. 1011;) Mississippi, (*Wasson* v. *Conner*, 54 Miss. 351; *Jones* v. *Porter*, 59 id. 628;) Texas, (*Brown* v. *Moore*, 38 Tex. 645; *Miles* v. *Kelly*, 40 S.W. Rep. 599;) North Carolina, (*Long* v. *Crews*, 113 N. C. 256;) Michigan, (*Grosbeck* v. *Seeley*, 13 Mich. 329;) Alabama, (*Griffith* v. *Ventres*, 91 Ala. 366; *Hays* v. *Southern Building and Loan Ass.* 124 id. 663;) Florida, (*Bank* v. *Rivers*, 36 Fla. 575;) Nebraska, (*Horbach* v. *Tyrrell*, 67 N. W. Rep. 485;) Connecticut, (*Association* v. *Spencer*, 26 Conn. 195;) West Virginia, (*Travener* v. *Barrett*, 21 W. Va. 681;) Missouri, (*Daniel* v.

Moore, 51 Mo. 589;) Kansas, (*Wills* v. *Wood*, 28 Kan. 400;) and Indiana, (*Hubble* v. *Wright*, 23 Ind. 323).

In *Kothe* v. *Krag-Reynolds Co.* (Ind.) 50 N. E. Rep. 594, it was held that an acknowledgment of a mortgage to secure an indebtedness to an incorporated company taken before a notary public who was a stockholder in the incorporation was void. This decision is based, in part, upon provisions of the statute of the State of Indiana, but the question was exhaustively treated and discussed by the court irrespective of the statute, and the conclusion announced that upon principles of public policy and according to the very great weight of authority an officer who has a pecuniary interest in the debt intended to be secured by a mortgage is disqualified from certifying that the mortgage was acknowledged before him by the makers thereof. We should here acknowledge that we have been greatly aided in the examination of this question by the citation of authorities collected by the writer of the opinion in the case last referred to. The authors of various works on mortgages and chattel mortgages, so far as the question is discussed by them, declare that it is against the policy of the law that any officer who is beneficially interested in the validity and binding force of a mortgage should take and certify to the acknowledgment thereof. Herman on Chattel Mortgages, sec. 28; Jones on Chattel Mortgages, sec. 249; Pingree on Mortgages, 216.

In *Hammers* v. *Dole*, 61 Ill. 307, we held that a justice of the peace was disqualified to acknowledge a chattel mortgage to secure a debt payable to himself and others, though under the law, as it then stood, he was the only justice of the peace who could lawfully acknowledge the mortgage. We there said: "The mortgage of appellants was void as to appellees. It was acknowledged before one of the mortgagees, who was a justice of the peace. This is against the policy of the law. An officer should not be permitted to perform either a ministerial or a

judicial act in his own behalf." In *Darst* v. *Gale*, 83 Ill. 136, the validity of an acknowledgment to a trust deed taken by an officer who was named as one of the trustees was involved, and we there said (p. 143): "The acknowledgment was taken by Grove, one of the parties named as trustees. This unquestionably rendered the deed void as to him, but we fail to comprehend how it adversely affected the deed as to the other trustees. He and they had no community of interest, and his becoming disqualified had no tendency to disqualify them." In 1 Cyc. p. 555, upon the authority of a number of adjudicated cases there cited, the author of the article on "Acknowledgments" declares the rule as follows: "The acknowledgment of an instrument in which a corporation is interested, financially, cannot be taken by a stockholder in such corporation." In *Iron Belt Building and Loan Ass.* v. *Groves*, (Va.) *supra*, *Merced Bank* v. *Rosenthal*, (Cal.) *supra*, *Hays* v. *Southern Building and Loan Ass.* (Ala.) *supra*, *Smith* v. *Clarke*, (Iowa) *supra*, *Miles* v. *Kelly*, (Tex.) *supra*, and *Bank* v. *Rivers*, (Fla.) *supra*, acknowledgments taken by officers who were also stockholders in corporations who were the grantees or mortgagees in the instruments so purported to be acknowledged, were held to be void, on the ground the officers taking the acknowledgments were disqualified to take the same by reason of their interest as holders of shares of the capital stock of the corporations.

The cases of *Cooper* v. *Hamilton Building and Loan Ass.* 97 Tenn. 285, *National Bank* v. *Conway*, 17 Fed. Cas. 1202, *Holton* v. *Col. Building Ass.* 6 Cin. Law Bull. 141, and *Lynch* v. *Livingston*, 6 N. Y. 422, are relied upon to support the view that an officer is not disqualified, by reason of interest, to take and certify an acknowledgment to a deed or mortgage. The ground of the decisions in the cases so relied upon, except that of the Supreme Court of Tennessee, is, that the act of taking an acknowledgment is ministerial only, and that an interested person is not disqualified from discharging a mere ministerial act.

The Supreme Court of Tennessee, in the decision referred to, regards the act of taking an acknowledgment as a judicial or *quasi* judicial act, and, though it declares acknowledgments taken before officers who are interested in the instrument "are contrary to public policy and by no means to be encouraged, and while the practice, which has become so prevalent, should be discountenanced and discouraged," still holds such acknowledgments should not be declared to be *per se* void, but, to quote again from the opinion of the court, "are open to attack, and the court will lend a ready ear to evidence of undue advantage, fraud or oppression arising out of the fact of such relationship or interest in the officer taking the acknowledgment." In the position thus assumed it is believed the Supreme Court of the State of Tennessee stands alone. The case is probably an exemplification of the adage that "hard cases make bad precedents." As to the contention advanced by the other of such cases, that acknowledgments of the character under consideration may be upheld on the ground they are ministerial acts only, it is only necessary to say these cases seem to stand opposed to an overwhelming current of adverse authority and to the better reasoning upon the point. Nor can such view be harmonized with the ruling of this court in *Snydacker* v. *Brosse*, 51 Ill. 357, and *O'Conner* v. *Wilson*, 57 id. 226, that an officer cannot legally perform the merely ministerial act of executing process in a case in which he is interested, nor the expression of this court in *Hammers* v. *Dole*, *supra*, heretofore quoted, that "the mortgage of appellants was void as to appellees. It was acknowledged before one of the mortgagees, who was a justice of the peace. This is against the policy of the law. An officer should not be permitted to perform either a ministerial or a judicial act in his own behalf."

The probative force which this court has declared shall be accorded to the certificate of the acknowledgment of the execution of a deed or mortgage affords a

most convincing reason for the maintenance and enforcement of the rule that one beneficially and financially interested in the validity of the deed or mortgage is not qualified to certify that it has been lawfully acknowledged. We have frequently announced that public policy and the security of titles to land require that the official certificate of the due execution of a deed or mortgage shall (in the absence of fraud, collusion or imposition,) prevail over the unsupported testimony of the makers of the instrument. (*Lickmon* v. *Harding*, 65 Ill. 505; *Russell* v. *Baptist Theological Union*, 73 id. 337; *Brady* v. *Cole*, 164 id. 116; *Tuschinski* v. *Metropolitan West Side Elevated Railroad Co.* 176 id. 420.) In *Russell* v. *Baptist Theological Union*, *supra*, we said (p. 341): "It is a rule that the acknowledgment of a deed cannot be impeached for anything but fraud, and in such cases the evidence must be clear and convincing beyond a reasonable doubt; and whilst the making of a false certificate would be a fraud on the party against whom it is perpetrated, there is in favor of the officer the fact that he is under his official oath when he grants the certificate, and the liability to indictment, conviction and infamy is certainly as strong incentive to truthful and honest action as is the restraint imposed on an interested witness, struggling for the gain following success in a suit and escaping loss by defeat. Hence the mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate. Nor will it be with slight corroboration." In *Brady* v. *Cole*, *supra*, we declared (p. 122): "It is a rule that the acknowledgment of a deed can not be impeached for anything but fraud, and in such cases the evidence must be clear and convincing, beyond a reasonable doubt. The mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate, nor will it with slight corroboration. (*Russell* v. *Baptist Theological Union*, 73 Ill. 337.) 'To impeach such a certificate the evidence should

do more than produce a mere preponderance against its integrity in the balancing of probabilities. It should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent.' (*Monroe* v. *Poorman*, 62 Ill. 523; *McPherson* v. *Sanborn*, 88 id. 150; *Marston* v. *Brittenham*, 76 id. 611.) The authorities very clearly lay down the rule that evidence offered to impeach a certificate of this character must fully and clearly satisfy the court that the certificate of the officer is false and fraudulent, and even a preponderance of evidence less than sufficient to establish a moral certainty to that effect is not sufficient."

The rule of public policy which accords such a high degree of credit to the certificate of acknowledgment of the execution of a deed or mortgage, and which exalts the official certificate of the officer so far above the sworn testimony of the parties who it is made to appear by the certificate have acknowledged the instrument, has its foundation in the other rule, which must control in the decision of this case, that an officer, in order to be deemed qualified to make a certificate of acknowledgment of such dignity, weight and importance to the public and to the parties to the instrument to be acknowledged, shall have had no personal pecuniary interest to be subserved by the execution and acknowledgment of the instrument. The intention of the law is, the certificate of acknowledgment shall be the official act of a disinterested officer. The certificate of acknowledgment of the execution of the mortgage here under consideration, and that the mortgagors had waived and relinquished their right and estate of homestead, was properly held to be void for the reason the notary public was, because of his financial interest in the debt to be secured by the mortgage, disqualified to discharge the official duty of certifying to the acknowledgment thereof.

It is well, as it seems to us, to here remark that an attorney or agent of a party who is beneficially inter-

ested in a deed or mortgage, or one who is a director or other officer, or an agent, but not a stockholder, in a corporation which is interested in the instrument to be acknowledged, is not disqualified to take and certify to an acknowledgment in an official capacity. 1 Cyc. p. 555; *Horbach* v. *Tyrrell, supra.*

The execution of the mortgage to the appellant company was proven by competent evidence independently of the acknowledgment, and was valid as between the parties to it except as to the homestead estate. (*Roane* v. *Baker*, 120 Ill. 308.) The disqualifying interest of the notary public was not apparent on the face of the mortgage or the certificate of acknowledgment thereof, and the registration and recording thereof was effectual to charge the appellee Landgraf with constructive notice of the mortgage. (1 Cyc. pp. 530, 553.)

The decree is affirmed.

Decree affirmed.

ROBERT W. SUNASACK

v.

LYDIA J. MOREY *et al.*

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. LANDLORD AND TENANT—*landlord bound to reveal concealed defects to tenant.* If there are concealed defects in demised premises, attended with danger to an occupant, which a careful examination would not disclose but which are known to the landlord, the latter is under legal obligation to disclose them to the tenant, and for failure to do so is liable for whatever damages actually result to the tenant therefrom.

2. SAME—*landlord liable for failure to inform a tenant of presence of sewer gas.* A tenant has the right, without making an examination for himself, to rely upon the landlord's assurance that the premises are free from sewer gas and in a healthy condition, and if the landlord knowingly misrepresents such facts he is liable for the damage resulting therefrom.

Sunasack v. *Morey*, 98 Ill. App. 505, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES A. BISHOP, Judge, presiding.

A. B. CHILCOAT, and W. P. BLACK, for appellant.

HECKMAN, ELSDON & SHAW, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an action brought by the plaintiff in the circuit court of Cook county to recover from the defendants damages in consequence of the presence of sewer gas in the portion of a building leased by him from them and occupied by himself and family as a barber shop and residence, by means whereof he and his family were made sick and he was forced to pay out large sums of money, etc.

The declaration, as amended, contained a number of counts, which alleged, in substance, that the defendants were the owners of a three-story brick building in the city of Chicago; that it was their duty to keep the same in good order, particularly as to sewerage and the plumbing connected therewith; that in disregard of such duty they suffered said premises to be in bad order and sewer gas to escape into said building in such quantities as to become dangerous to tenants, all of which was well known to the defendants and which was unknown to the plaintiff; that the plaintiff applied to the defendants to lease a portion of said premises, and upon inquiry was assured by the defendants that the premises were free from sewer gas and in a healthy condition; that, relying upon such assurance, the plaintiff rented a portion of said premises from the defendants and occupied the same as a barber shop and dwelling house for himself and family; that soon thereafter he discovered sewer gas escaping from the sewers connected with said building into the portion thereof occupied by himself and family; that he gave

notice thereof to the defendants, who promised to remedy the same, which they failed to do; that by reason of the premises he and his family were made sick, and he was required to and did lay out large sums of money, etc. A demurrer to the declaration was sustained and judgment rendered for the defendants, from which the plaintiff appealed to the Appellate Court for the First District, where the judgment was affirmed, and a further appeal has been prosecuted to this court.

The law is well settled that the rule of *caveat emptor* applies to a contract of letting, and the landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. The tenant takes the premises as he finds them, subject to his own risk, and there is no implied covenant on the part of the landlord that they are fit for habitation or fit for the purposes for which they are rented, or that they are in any particular condition. The landlord is therefore not liable for damages resulting to the tenant by reason of the demised premises being out of repair, unless he has expressly bound himself to make repairs by the terms of the contract to let. Where, however, there are concealed defects in the demised premises, attended with danger to an occupant, which a careful examination would not disclose but which are known to the landlord, the latter is under obligation, imposed upon him by law, to reveal them to the tenant in order that he may guard against them, and upon the landlord's failure to perform such duty he will become liable for whatever damages actually result to the tenant therefrom. 1 Thompson's Commentaries on the Law of Negligence, secs. 1129-1131; 18 Am. & Eng. Ency. of Law,—2d ed.—p. 224; 2 Wood on Landlord and Tenant, sec. 381.

In *Cowen* v. *Sunderland*, 145 Mass. 363, it is said (p. 364): "When there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to

reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs."

In *Anderson* v. *Hayes*, 101 Wis. 538, the court say (p. 543): "The principle is well settled that a tenant takes leased premises in the condition in which they happen to be when leased, and that the landlord is not liable to the tenant for injuries resulting from lack of repair unless he has contracted to repair, or unless the defect be a concealed one known to the landlord and not disclosed to the tenant, and not discoverable by the use of that degree of care which the law demands."

In *Coke* v. *Gutkese*, 80 Ky. 598, (44 Am. Rep. 499,) the defendant let a house to the father of plaintiff knowing that the timbers of the privy vault were rotten and unsafe, but concealed that fact from the tenant. The timbers gave way and the plaintiff was precipitated into the vault and greatly injured. The court say: "Although the law presumes that it was her father's duty to repair the premises in the absence of an agreement otherwise, still we are of the opinion that if the appellee rented the premises knowing that the privy was in the condition alleged it was his duty to disclose his knowledge, because it was a portion of the premises which he knew, as all men know, would be in daily use by his tenant and family, and unless apprised of the hidden danger they would inevitably be injured and the younger and more helpless perhaps lose their lives."

In *Moore* v. *Parker*, 53 L. R. A. (Kan.) 778, the plaintiff and her husband were occupying a farm rented of the defendants. While the plaintiff was about her household duties upon said premises, drawing water from a well used for domestic purposes and located at the residence, the platform around the well gave way, precipitating her into the well, from which she sustained personal injuries.

The defendants had notice of the defective condition of the well but failed to notify plaintiff or her husband of such defect. The court say: "A landlord is not an insurer or a warranter, nor is he compelled to exercise constant care and inspection, but if he knows that the premises which he is about to let are in a dangerous condition, and especially if such danger or defect is not obvious or is not discoverable by the tenant by the exercise of ordinary care, and does not inform him of such danger, and injury is occasioned thereby to the tenant or a member of his family, the landlord is liable in damages."

In *Kern* v. *Myll*, 80 Mich. 525, the trial court directed a verdict for the defendant on the ground that the plaintiff's declaration did not disclose a cause of action. The judgment was reversed and a new trial ordered. The court say (p. 530): "The cause alleged does not rest upon any covenant, express or implied, of the landlord to repair the premises nor that they were habitable at the time the lease was made, nor does it rest necessarily upon the relation of landlord and tenant, although the lease is set up by way of inducement, to show the right of the plaintiff to possession of the premises, but the cause of action is based upon the maxim that every person must so use his own premises as not to injure others, either in person or property, rightfully in the vicinity. The declaration sets up the construction and continuance of a nuisance by the defendant upon his own land to the injury of the plaintiff, the existence and cause of which were unknown to the plaintiff and were known to but were concealed from him by defendant. It discloses a cause of action in tort, resting upon the duty of the defendant to disclose to the plaintiff defects in the premises amounting to nuisances, known to defendant and concealed from plaintiff, which were calculated to impair, and did impair, the health of the plaintiff."

In *Snyder* v. *Gordon*, 46 Hun, 538, it was held if the tenant learns, before taking the lease, that a contagious dis-

ease has been in the house, and upon asking the landlord about it is informed that the report is untrue, he has a right to rely upon the landlord's statement and need not take further precautions to ascertain as to the fact.

The declaration averred that sewer gas was escaping into the demised premises, which fact was known to the defendants and unknown to the plaintiff; that the plaintiff applied to the defendants to lease the same for a barber shop and a place of residence for himself and family; that he made inquiry of the defendants if said premises were free from sewer gas and in a healthy condition, and that the defendants assured him they were; that, relying upon such assurance, he rented the premises and occupied the same as a barber shop and dwelling house for himself and family, and that in consequence of sewer gas escaping from the sewer connected with said building into the portion thereof occupied by himself and family he and his family were made sick and disabled, and he was put to great expense in attempting to heal himself and family. The fact that sewer gas was escaping into said premises being known to the defendants and not known to the plaintiff, it was the duty of the defendants, at the time of the leasing, to disclose that fact to the plaintiff. It was a source of danger not apparent to the plaintiff but known to the defendants, and the plaintiff had the right, without making an examination for himself, to rely upon the assurance of the defendants that the premises were free from sewer gas and in a healthy condition.

The demurrer to the declaration should have been overruled and the defendants required to plead thereto. The judgments of the Appellate and circuit courts will therefore be reversed and the cause remanded to the circuit court, with directions to that court to overrule the demurrer to the declaration.

Reversed and remanded.

JOHN SIMPSON *et al.*

v.

JOHANNA E. MIKKELSEN *et al.*

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. BUILDING LINES—*when plat sufficiently establishes a building line.* A building line is sufficiently established by a plat showing a subdivision of land into blocks and lots, where a highway through the center of the subdivision is designated as a boulevard two hundred and fifty feet wide, and where a dotted line is drawn through the lots in all blocks fronting on the boulevard, over which are the words, "Building line fifty feet north from boulevard line."

2. SAME—*term "building line" is not of doubtful or obscure meaning.* The term "building line" is not of doubtful or obscure meaning, but is a well understood term when used upon town or city plats.

3. SAME—*reservation of building line creates an easement.* The designation of a building line upon a plat creates an easement for the benefit of the public, and especially for the benefit of the property abutting upon the street, and it is not necessary for the plat to mention or set forth the persons to be benefited by the reservation.

4. SAME—*grantee is not relieved from building restrictions because not mentioned in his deed.* If a deed refers to a plat or subdivision, the particular descriptions shown on such plat or subdivision are a part of the deed, and the grantee is not relieved from binding restrictions appearing in the plat because they are not expressly mentioned in his deed.

5. EVIDENCE—*when evidence that others have not observed building line is immaterial.* In a suit to enjoin the defendants from maintaining a building within the limits of the building line established by the plat of the subdivision, evidence that other property owners in another adjoining subdivision had violated a building restriction is immaterial.

6. DEDICATION—*acceptance of dedication of boulevard is an acceptance of appurtenant building restriction.* The acceptance by the public of the dedication of a boulevard in the plat of a subdivision is an acceptance of a building restriction appurtenant thereto, indicated on the plat by a dotted line marked "building line fifty feet north from boulevard line."

APPEAL from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

OLAF E. RAY, for appellants.

J. HENRY KRAFT, and DELAVAN B. COLE, for appellees.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in chancery in the superior court of Cook county, begun by Johanna E. Mikkelsen and eleven other complainants, owners of lots fronting on Humboldt boulevard between California avenue and Western avenue, in the city of Chicago, seeking to compel appellants, John Simpson and Minnie Simpson, to move back to a building line fifty feet from the street a two-story frame dwelling house which had been constructed by the latter upon lot 22, twenty-three and one-fourth feet from the street, in block 7, in Harriet Farlin's subdivision of the west half of the south-east quarter of section 25, etc. Persons holding encumbrances against said lot 22 were also made parties defendant. The West Chicago Park Commissioners, by leave of the court, filed an intervening petition and were made parties complainant, asking the same relief.

The original bill alleges that on March 29, 1871, Harriet Farlin, being then the owner of a portion of section 25, township 40, range 13, in Cook county, subdivided the same and laid it out in blocks and lots, and that the subdivision was by the town trustees approved and duly recorded; that in laying out said subdivision she set apart a strip of land two hundred and fifty feet in width for boulevard purposes and designated the same "Humboldt boulevard;" that the plat contains a statement upon its face that said strip of land is to be used as a public boulevard by the West Chicago Park Commissioners; that thereby that part of Humboldt boulevard in the plat was dedicated to the West Chicago Park Commissioners for the purposes mentioned; that said dedication was duly accepted by the park commissioners, and that they became vested with the title thereof for the purposes mentioned; that upon said plat, so accepted, "there was made and established by the said Harriet Farlin, upon all the property fronting upon said Humboldt boulevard, what is generally known as

and called a building line, covering a space of fifty feet off the front part of premises fronting on Humboldt boulevard, which line on the said map and plat then became established, it being the intent that no building should extend beyond this line, but that the space should be kept free and clear from buildings of every kind;" that said building line has been observed and maintained by each and all purchasers of lots along said boulevard except one Soren Nielson and one John Simpson, who have been the owners of said lot 22, and that they allowed a certain frame house to be built upon and remain upon the premises designated as being within the building line, etc. The prayer is for a writ of injunction directed to Soren Nielson, John Simpson and Minnie Simpson, restraining them, and each of them, from further permitting the said building situated on said lot 22 to encroach upon the building line established upon and along Humboldt boulevard, and requiring them, and each of them, to remove the same from the building line, and restraining them from maintaining said building south of said building line, etc. Defendants answered, saying that they had no knowledge or information in regard to the making, establishing, marking and setting off of said building line, and averring that several of the complainants have themselves failed to observe the said building line in the construction of their dwelling houses. Upon the hearing a decree was rendered in conformity with the prayer of the bill and the intervening petition, and a writ of injunction granted as prayed. Defendants appeal to this court to reverse the decree below.

The chief contention of appellants is, that the building line fifty feet from Humboldt boulevard was not so definitely established as to be binding upon them, and therefore the decree below compelling them to observe the restriction as to the location of houses is erroneous.

The complainants introduced in evidence the plat of Harriet Farlin's subdivision, and it shows a subdivision

consisting of sixteen blocks of land, laid off into lots. Through the center of the subdivision is a highway designated "Humboldt boulevard," two hundred and fifty feet in width. Upon the plat a short distance from this boulevard, across the lots in all of the blocks fronting thereon, is a broken line having the appearance of a series of dashes, and immediately over the line extending through block 7 are written the words, "Building line fifty feet north from boulevard line." There can be no question, from an examination of the plat, that the purpose of this language and the broken line was to reserve a space fifty feet in width off the front end of the lots abutting upon Humboldt boulevard upon which no buildings were to be erected. The term "building line" is not of doubtful or obscure meaning, but is a well understood term when used upon town or city plats. The reservation is an easement for the benefit of the public, and especially all the property abutting upon the street in this subdivision. The space between the building and the street belongs absolutely to the owner of the lot, subject to this easement, and the owner of this and the other lots in the subdivision are guaranteed whatever benefits may result from an unobstructed view across the entire reservation.

In support of his contention that the building line indicated on the plat does not sufficiently establish the building restriction, counsel relies upon the case of *Eckhart* v. *Irons*, 128 Ill. 568. But that case rather sustains the contention of appellees. The plat there under consideration showed a dotted line twenty feet from the street, speaking of which we said it "is a designation on the plat of the front line of the building to be thereon erected." The questions, however, there decided have no proper application to this case.

Counsel says there is no grantee or donee of the supposed easement, nor is it indicated by any certificate or statement upon the plat to whom or for what purpose

the easement is created. The persons to be benefited by such a reservation are understood and need not be expressly mentioned or set forth, any more than it is necessary to explain or set forth the persons to be benefited by a street or an alley.

Counsel also says the reservation is in nowise referred to in any of the deeds made by Mrs. Farlin to her grantees. The conveyance under which defendants claim title recognizes the plat, and describes the property simply as "lot No. 22, in block 7, in Harriet Farlin's subdivision," etc. Where a deed refers to a plat or subdivision, the particular descriptions shown upon such plat or subdivision are as much a part of the deed as though they were recited in it. (*Henderson* v. *Hatterman*, 146 Ill. 555; *Smith* v. *Young*, 160 id. 163.) Property owners are not relieved from the binding force of building restrictions merely because they are not expressly reserved in the conveyances to them. *Ewertsen* v. *Gerstenberg*, 186 Ill. 344.

Upon the hearing an attempt was made by appellants to show that owners along Humboldt boulevard beyond Mrs. Farlin's subdivision had failed to observe the building restriction. This evidence was excluded, and it is complained that the action of the court was erroneous. The fact that other owners, in another adjoining subdivision, had failed to observe a building restriction could in nowise excuse defendants and justify them in violating the building restriction in their subdivision, and the evidence was therefore immaterial.

There is no contention that the public has failed to accept the dedication of the alleys, streets and the boulevard shown upon the plat, but it is said, inferentially, that there is nothing to indicate that this easement,—that is, the building restriction,—was ever accepted by the public. The contention is without merit. As we have seen, the building line being clearly designated upon the plat, and this reservation or easement being for the benefit of the public generally, including the adjoining own-

ers, when the dedication of the boulevard was accepted by the public the building restriction appurtenant thereto was also accepted.

The decree of the superior court was clearly right and will be affirmed. *Decree affirmed.*

THE CITY OF CHICAGO
v.
THE NORTON MILLING COMPANY.

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. MUNICIPAL CORPORATIONS—*city has power to acquire land for bridge purposes.* A city organized under the general law has power to construct bridges, to deepen, widen or change the channels of water-courses, to erect docks and keep them in repair, and to acquire, by purchase, lease or gift, not to exceed four acres of land for bridge purposes.

2. SAME—*right of city to contract for easement of right to swing bridge over property.* A city has power, in connection with the widening of a river and the building of a new bridge, to acquire an easement consisting of the right to swing the bridge over ground owned by a milling company, and may agree, in consideration of such easement, which will necessitate the removal of the milling company's boiler rooms, to excavate a vault under the street for its use as a boiler room, rent free, and to rebuild the milling company's dock upon the new line of the river bank, and indemnify the company against damages from the city's tortious acts.

3. SAME—*effect where lawful contract by city is irregularly made.* If a contract is within the power of a municipal corporation but is executed by officers not having authority to make it, the contract may be ratified by the city, and the city may be estopped to deny the validity of its acts in that respect.

4. SAME—*when expense of work may be paid from bridge appropriation.* The expense of carrying out a contract made by a city to acquire an easement of the right to swing a new bridge, about to be constructed, over private property not condemned, may properly be paid out of the appropriation for the cost of the bridge, the whole work being necessitated by the construction of such bridge.

5. SAME—*city officers presumed to act for best interests of the city.* In the absence of proof to the contrary, it will be presumed that the action of the corporation counsel in dismissing a condemnation petition for bridge extension as to a portion of the property, and

of the mayor and commissioner of public works in executing a contract to acquire an easement of the right to swing the bridge over the property not condemned, was for the city's interest.

6. SAME—*whether city ratified contract is a question of fact.* In an action at law on a contract executed by officers of the city having no authority, the question whether the city ratified the contract is one of fact, upon which the judgment of the Appellate Court is conclusive.

MAGRUDER, J., does not concur.

City of Chicago v. *Norton Milling Co.* 97 Ill. App. 651, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

The appellee, the Norton Milling Company, on April 28, 1892, brought this suit against the appellant, the city of Chicago, to recover damages under a certain contract alleged to have been made between it and the city. The appellant filed a plea of general issue October 24, 1894. Afterwards, in 1898, it filed additional pleas, that no appropriation had been made, at the time of making the supposed contract, for the payment of money promised to be paid, as alleged in the declaration, and set-off for rent. And again, in 1900, it filed plea of general issue sworn to, and plea of entire want of consideration. The trial was held in July, 1900, and judgment was rendered on a verdict of $11,879 damages in favor of appellee. This judgment was affirmed by the Appellate Court.

In 1887 the city council of the city of Chicago directed its law department to report what action had been taken relative to the condemnation of property on the west side of the river, at Madison street, for the purpose of a double roadway bridge. Subsequently, in March, 1889, the city council passed an ordinance for widening the south branch of the Chicago river north of and adjoining West Madison street, directing a certain triangular strip to be condemned for that purpose. Shortly afterward there was an appropriation made of $200,000 for the con-

struction of a new bridge at Madison street. Thereupon, on April 6, 1889, the city filed its petition for condemnation in the superior court. The property sought to be condemned lay between the mill of appellee and the west bank of the river, beginning at a point on the dock twelve feet east of the south-east corner of the mill and running thence west to within two feet of this corner, thence north-easterly about seventy feet to a point on the dock, thence south to the place of beginning, thus making a triangular piece. April 13, 1889, the corporation counsel dismissed the petition as to the west three and a half feet of the tract proposed to be taken, and the case was submitted to the court without a jury, and the court assessed the compensation for the property sought to be taken and damaged at $10,290, which amount was paid by the city. On the same day the contract which is made the foundation of this suit was entered into between appellee and appellant, and signed on behalf of appellant by John A. Roche, mayor, and George B. Swift, commissioner of public works. This contract, after reciting the condemnation proceedings, is as follows:

"Whereas, the said widening of the river is intended by said city to be done in connection with the construction of a new double bridge at Madison street, and in part for the purpose of enabling the said city properly to construct and operate said bridge; and whereas, said city desires to acquire the right to swing said bridge, when constructed, over a portion of said lot nine (9) lying between said mill building and said river, and not condemned or to be taken for the purpose of widening said river, as aforesaid, and the granting of such right or easement by said party of the first part, and the use and enjoyment thereof by said party of the second part, will necessitate certain changes in the engine room, located in the south-east corner of said mill building, and the removal of the boilers of said party of the first part from their present location at the south-east corner of said

building, whereby said party of the first part will be subjected to great expense, and will also be exposed to great loss and inconvenience by and through the interruption to its business resulting therefrom.

"Now, therefore, in consideration of such right or easement, as hereinafter granted by said party of the first part, and of the expense and loss to be borne by said party of the first part by reason thereof, as aforesaid, said party of the second part hereby agrees that before taking possession of the strip of land condemned, as aforesaid, or disturbing said party of the first part in the occupation of said premises or of its boiler room as now located, it will excavate the north half of that portion of Madison street extending from the Chicago river to West Water street to the level of said boiler room as now occupied, and will enclose by proper walls the space so made, and will and does hereby give the use of the same to said party of the first part, its successors and assigns, free of rent, for so long a term as said party of the second part has or may hereafter acquire power to give or grant the use thereof, for the use of said party of the first part, its successors and assigns, as a boiler room and for the storage of coal in connection with said mill building or other buildings which may hereafter be erected on said property and used for manufacturing purposes or requiring steam power for any purpose; and that it, said party of the second part, will also, and hereby does, agree to protect and indemnify said party of the first part, its successors and assigns, from and against all damages to said building, or the contents thereof, which may result from the change of dock line or the operations of said party of the second part, its agents, contractors or employees, in the construction of a new dock, and that such new dock, when constructed, shall be similar and equal in character and construction to the present dock, and also that in constructing the same it will provide, by driving piles or otherwise, suitable and adequate pro-

tection from vessels, satisfactory to said party of the first part, for the fly wheel of the engine, now projected through the east wall of said mill building. And said party of the first part, in consideration of the agreements aforesaid to be performed by said party of the second part, and for so long a period as the use of said space under Madison street shall be permitted and secured to it, its successors and assigns, as aforesaid, does hereby give and grant unto said party of the second part the right to swing said new bridge, or any bridge built to re-place the same, over the south-east corner of said lot nine (9), on a circle so drawn that said bridge, in swinging thereon, shall not at any point pass said building, or any building to be erected having the same east line, at a distance of less than two feet."

On the same day the city made two contracts for the erection of the bridge, but nothing is said in either of these contracts about the re-construction of the dock or the making of the vault for the use of appellee. The new bridge was begun in the spring of 1891 and opened for traffic October 16, 1891. The old abutment and dock were removed and a new dock put in about five feet west of the old one, and the space in Madison street was dredged out about eighteen feet west of the former line. After this work was done, cracks appeared in the wall of the mill building, and the building settled about six inches at the south-east corner. The shafting got out of line and had to be lined up repeatedly. The engine bed also settled. Appellee claimed that this was due to the unskillful way in which the work of re-constructing the dock was done. Appellant claimed that it was not due to this cause, but to the overloading of the foundations with additional stories and the general overloading of the building with heavy machinery. Rods were put in the dock and anchored to the building by direction of the city engineer, and more rods were put in afterwards by appellee to strengthen the mill building.

CHARLES M. WALKER, Corporation Counsel, and THOS. J. SUTHERLAND, for appellant.

FRANCIS M. WALKER, and BYRON BOYDEN, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The admission of the contract in evidence is assigned as error. It is contended that the city officials who signed the contract had no authority to do so on behalf of the city; that it is void because no previous appropriation was made to pay the obligation of the city created by it, and because it arose out of the illegal act of the corporation counsel in dismissing the petition as to part of the land sought to be condemned; that it is not mutual; that the city had no right to acquire any interest in land except by condemnation; that there was no consideration to support the contract, and that the portion granting the use of the street to appellee is void for lack of power in the city to make such a grant. On behalf of appellee it is contended that the most that can be alleged against the validity of the contract is, that it was entered into in an unauthorized manner. It is contended, however, that it has been fully executed and that the city has received the benefit of it, and that the city, by its acts and by its acquiescence, ratified the act of its mayor and commissioner of public works and is estopped to deny its validity.

The city had power to construct bridges; to deepen, widen, dock, alter or change the channels of water courses; to erect and keep in repair, regulate and control docks. (Rev. Stat. 1874, chap. 24, par. 62.) It also had the power to acquire, by purchase, lease or gift, not to exceed four acres of land for bridge purposes. (Laws of 1877, p. 61; Starr & Cur. Stat. chap. 24, par. 284.) The city, instead of acquiring all the land at first sought to

be condemned, which would have brought its property to within two feet of the Norton mill, took a smaller portion. This necessitated acquiring the right to swing the end of the new Madison street bridge over a portion of appellee's premises. Its officers then entered into a contract with appellee by which the city acquired this right, and in consideration therefor agreed to construct the vault under Madison street and give the use of it, rent free, to appellee for as long a time as it had power to do so. It is also recited in this part of the contract that the use and enjoyment of the easement of swinging its bridge over this part of appellee's premises would necessitate certain changes in the engine room and the removal of the boilers from their then location at the south-east corner of the building, and thereby subject appellee to great expense, and to great loss and inconvenience through the interruption of its business resulting therefrom, and this expense and loss are made part of the consideration for the contract. Whether this arrangement,—that is, the taking of about half the land originally contemplated to be taken and the building of this vault for appellee for the privilege of swinging the bridge over its premises,—was more or less advantageous to the city than the condemnation of the whole strip would have been does not appear. The facts show that the whole strip was not needed for the purpose of widening the river sufficiently for the new bridge. That the city might make such an arrangement or compromise, when sanctioned by the city council, is undoubted. The city having power to do so, the act of its officers in making this contract was not *ultra vires* the corporation and illegal, but only beyond the authority delegated to the officers, and could be ratified by the city, and the city might be estopped to deny the validity of their acts. (*Town of Bruce* v. *Dickey*, 116 Ill. 527; *Barnard & Co.* v. *County of Sangamon*, 190 id. 116.) In so far as this part of the contract is concerned, it was mutual and founded on a legal con-

sideration. The lease of the vault under Madison street was not illegal, such leases having been upheld in *Gregsten* v. *City of Chicago*, 145 Ill. 451, and under the contract the city was not entitled to recover any rent therefor. Nor does this conflict with what is said in *Hibbard* v. *City of Chicago*, 173 Ill. 91. In that case an awning had been erected, which the court held was an unlawful obstruction in the street. The vault spoken of was beneath the street and not an obstruction of any kind, and the city is not estopped by the contract from reclaiming this space whenever necessary for the uses of the public.

We think the facts show that the city ratified the contract with full knowledge. The contract was executed in duplicate in 1889, and a copy of it was presumably filed in the appropriate public office. The work that was done under it was done by a succeeding administration. The work of re-building the dock and constructing the vault under Madison street was done by and under the direction of the city and paid for by the city. The bridge was opened for traffic in 1891, and has been used and swung over the premises of appellee ever since. It is true, this suit was begun in 1892,—only six months after the opening of the bridge; but no plea attacking the contract was filed till 1898, nor was any act shown by the city disaffirming or ignoring the contract. It was fully executed. As was observed before, it does not appear whether the action of the corporation counsel in the premises was more beneficial to the city than the condemnation of the whole strip, as directed by the city council, would have been, but in the absence of any testimony to the contrary we must presume that the counsel, mayor and commissioner of public works acted for the best interests of the city in what they did. That the conduct of a suit is largely within the control of the attorneys needs no demonstration. But at all events, whether the city ratified the contract or not was a question finally settled in the Appellate Court.

The objection that the contract is void because there was no previous appropriation to pay for the expense incurred under it is of no force. It does not appear from what appropriation the cost of the new dock or of the building of the vault was paid for, nor even what they cost. The whole work being necessitated by the building of the new bridge, it would have been proper to have paid for the same out of the appropriation which was made for the bridge. But by the contract the city also agreed to protect and indemnify the appellee from and against all damages to its building, or the contents thereof, which might result from the change of the dock line, or the operations of the city, its agents, contractors or employees, in the construction of the new dock. That the city would have been liable to appellee in an action on the case for doing this work in an unskillful manner, by which appellee would have been damaged, is settled. (*City of Chicago* v. *Seben*, 165 Ill. 371, and cases cited.) It was its duty, before entering upon the proposed work of widening the river and constructing the bridge at this point, to take into consideration the situation of appellee's mill and the danger to which it would be exposed by the making of these improvements. In so far as the city, by its contract, undertakes to indemnify the appellee for its tortious acts, we see no reason why such contract should not be binding upon it. No damages are sought to be recovered in this action for anything but the results of the unskillful manner in which it was claimed this work was done.

It is strenuously insisted that evidence was admitted which was not competent under the averments of the declaration and the terms of the contract. The declaration counts on damages caused by the operation of the city, its agents, contractors and employees, in making a change of the dock line and in the construction of a new dock. Evidence was admitted as to the effect upon appellee's mill of the work done at the center pier of the

bridge and in dredging out the river, and in and about the taking out of the old abutment and of the dredging and piling done in respect to the same. All of the work done was made necessary by the building of the new bridge. The condemnation proceedings were instituted for the purpose of acquiring sufficient land for widening the river and for building the new bridge. The subsequent agreement with appellee was a part of the proceedings necessary for the work contemplated. The construction of the new dock and of the vault under Madison street thereby became part of the work necessary to the widening of the river and building of the new bridge. That the city contemplated doing this work is recited in one of the preambles of the contract. The change of the dock line and construction of a new dock were thus parts of the whole improvement undertaken by the city, and were so intimately connected and related that it behooved the city officials in charge of the work to take into consideration the inter-relation of the several parts of the work, and to be guided in their manner of doing each part by the effect it would have on the other parts of the entire work. Whether the pulling out of the piles under the old center pier of the bridge and the dredging of the river at that point would or did have any effect on the work on the new dock or on appellee's mill was strongly contested at the trial, the witnesses testifying to diametrically opposite opinions. Likewise as to the effect of pulling out the piles under the old abutment, the dredging back of Madison street for about eighteen feet and the putting in of new piles. As all of this work was done practically at about the same time that the new dock was constructed, it was a proper subject of inquiry.

There was no error in allowing evidence to be given of what was done by the city engineer to strengthen the building when his attention was called to the fact that its walls were beginning to crack. It only showed, at

most, that in the opinion of the city engineer something ought to be done to prevent further damage to the mill.

Objections are made to the hypothetical questions asked the various experts as to the cause of the settling of appellee's mill building, on the ground they did not state the facts fully. We think these questions stated the facts fairly, and the appellant, on cross-examination, drew from these experts the reasons on which they based their opinions, thus enabling the jury to judge how much weight to give to them.

We have carefully examined the instructions given and refused by the court and find no error in the rulings of the court thereon. Most of the refused instructions asked by appellant were based on its theory that the contract was illegal and invalid. They were properly refused. Appellant's theory that the evidence showed that the damage to appellee's building was due to internal causes was fully presented by the instructions given.

Special objection is urged as to the court's modification of the appellant's nineteenth instruction. While this modification is perhaps open to the objection urged against it, it could have done appellant no harm, as the evidence showed that appellee did not rely on the fact that the engineer had had some rods put in to strengthen the mill, but continued to and did put in more rods itself to strengthen the building.

There are other objections made to the evidence and to other points, which we have considered, but do not think it necessary to go over them in detail. They were properly disposed of by the Appellate Court.

The judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE MAGRUDER does not concur.

W. H. MYERS *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. SPECIAL ASSESSMENTS—*ordinance must be made clearly to appear unreasonable before court can so declare.* The city authorities are the best judges of the necessity of extending its system for supplying inhabitants with water and with fire protection, and the courts cannot declare the ordinance void for unreasonableness unless it is manifestly so or is made clearly to so appear from the evidence.

2. SAME—*when a water pipe ordinance will not be held unreasonable.* In the absence of proof that the lots assessed for water pipe extension are not benefited to the amount of the assessment, the fact that the lots, which are worth about $250 each, are each assessed $18.50 for the improvement does not justify the court in holding the ordinance void for unreasonableness.

APPEAL from the County Court of Cook county; the Hon. WILLIAM T. HODSON, Judge, presiding.

This is an appeal from the confirmation of a special assessment, to-wit, $5750.10, to pay the cost of putting in and along certain streets running through the district assessed, within the limits of the city of Chicago, water pipes connected with the water-works system of the city, to supply the inhabitants of such district with water and for fire protection.

The ordinance provided "that a cast-iron water supply pipe of the city of Chicago standard, of eight inches internal diameter and a weight of forty-six and one-fourth pounds per lineal foot, be and the same is hereby ordered constructed and laid in West Fifty-fifth street along a line twenty-five feet north of and parallel with the south line thereof, from a point twenty-five feet east of the west line of South Spaulding avenue to a point twenty-five feet east of the west line of Turner avenue," and provides for one fire hydrant on said West Fifty-fifth

street; also, "that a cast-iron water supply-pipe of the city of Chicago standard, of six inches internal diameter and a weight of thirty-five pounds per lineal foot, be and the same is hereby ordered constructed and laid in South Spaulding avenue along a line twenty-five feet east of and parallel with the west line thereof, from and connecting with the water supply-pipe line in West Fifty-fifth street hereinbefore provided for, to a point twenty-five feet south of the north line of West Sixtieth street, and thence along a line twenty-five feet south of and parallel with the north line of West Sixtieth street, to and connecting with the water supply-pipe now laid in West Sixtieth street at the west line of South Spaulding avenue," and provides for nine fire hydrants along the line of the improvement; also, "that a cast-iron water supply pipe of the city of Chicago standard, of six inches internal diameter and a weight of thirty-five pounds per lineal foot, be and the same is hereby ordered constructed and laid in Turner avenue along a line twenty-five feet east of and parallel with the west line thereof, from and connecting with the water supply-pipe in West Fifty-fifth street hereinbefore provided for, to the north line of West Fifty-seventh street," and provides for five fire hydrants along the line of the improvement.

The evidence showed that the improvement was about eight miles from the center of the city and that there were about fifteen dwelling houses in the district assessed; that there were other settlements provided with city water, some beyond and others in different directions from the district in question, a mile or a mile and a half distant; that the inhabitants of the district assessed obtained their water supply from wells and cisterns, which in some instances had been condemned by the health department of the city. No evidence was introduced by the objectors that the property assessed, the most of which was vacant lots, was not benefited to the amount of the assessment against it.

J. T. BOOZ, for appellants.

ROBERT REDFIELD, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The only point made by appellants in their argument in this court for reversal of the judgment of confirmation is, that "the ordinance is premature, unreasonable, unjust, unnecessary and oppressive, and therefore void." We cannot sustain appellants' contention on the record presented. The evidence tended to prove that the lots were assessed each $18.20 and that their value was about $250 each. The assessment may appear to be burdensome, especially upon the vacant property, but there was no evidence that the property was not benefited by the improvement as much as it was assessed. The presumptions are all in favor of the reasonableness of the ordinance, and we cannot declare it void unless it is manifestly so or is made so to appear from the evidence. The municipal authorities are the best judges of the importance and necessity of the extension of its system for supplying the inhabitants of the city with water and for fire protection. We do not mean to say that an ordinance for such purposes may not, as for any other, be held void for unreasonableness, but only that it must be made clearly to appear that it is unreasonable before the courts can so declare. The facts do not bring the case within the same class of cases cited by appellants, viz.: *City of Chicago* v. *Rumpff*, 45 Ill. 90; *Tugman* v. *City of Chicago*, 78 id. 405; *Toledo, Wabash and Western Railway Co.* v. *City of Jacksonville*, 67 id. 37; *City of Lake View* v. *Tate*, 130 id. 247; *Hawes* v. *City of Chicago*, 158 id. 653.

The judgment will be affirmed.

Judgment affirmed.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS

v.

EDWARD LUNDAK.

Opinion filed April 16, 1902—Rehearing denied June 10, 1902.

1. EVIDENCE—*what tends to show negligence in placing props in mine.* That a prop was so placed in a mine as to fall by itself or to be knocked down by a car passing upon the track is evidence tending to prove a want of reasonable care by the company.

2. MINES—*what not such rules as are contemplated by section 32 of Mining act of 1899.* Alleged rules of a mining company, consisting of notices and statements to the effect that the business is dangerous and every employee must take constant care to avoid injury; that persons accepting employment do so with notice that the danger from falling roof and coal is one of the usual risks; that every place in the mine is dangerous, and that it is the duty of the employee to ascertain and avoid injury, etc., are not such rules as are contemplated by section 32 of the Mining act of 1899, (Laws of 1899, p. 324,) and, in so far as they are claimed to operate as a contract against the negligence and dereliction of the company, they are void as against public policy.

Consolidated Coal Co. v. *Lundak*, 97 Ill. App. 109, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Madison county; the Hon. WILLIAM HARTZELL, Judge, presiding.

CHARLES W. THOMAS, for appellant.

BURTON & WHEELER, (W. E. HADLEY, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee was employed as driver of a mule hauling loaded cars along a track in appellant's mine from the place where the coal was mined to the pit and returning with empty cars. He was injured by the fall of a section of slate and clod mixed with rock, from the roof of the mine, upon the track along which he was driving the

mule, and brought this suit to recover the resulting damages. He obtained a verdict and judgment, and the judgment was affirmed by the Appellate Court.

The argument is directed to the alleged error of the trial court in refusing to direct a verdict for the defendant on the ground that there was no evidence tending to prove any of the allegations of negligence contained in any count of the declaration. It is not contended that there was any evidence tending to prove a want of care on the part of the plaintiff, or that the evidence did not establish the exercise of proper care by him. There was no evidence tending to show that he assumed the risk of the manner in which the roof was supported, or that he was aware of the danger, or had any reason to suspect it. The declaration charged a neglect of the duty imposed by law upon the defendant to furnish plaintiff with a reasonably safe place in which to work, by failing to reasonably secure the roof of the mine by props, crossbars or timbers. The evidence on that question was substantially as follows: There was a permanent track laid on cross-ties up to about fourteen feet from the face of the coal that was being mined. From that point to the face of the coal there was a temporary track, consisting of T rails laid on their sides on the bottom of the mine with no ties under them. There was a down grade from the permanent track to the face of the coal, and at the connection the temporary track was about an inch and a half below the permanent one. The hanging piece of slate and clod that fell was near the junction of the two tracks, and a witness said that it was over the permanent track, two or three feet from its end. The day before the accident, defendant's timberman, who was employed to secure the roof, had his attention called to the dangerous condition at that place and said that he could put a bar up. A loader at the face of the coal asked him not to put it up until after a shot had been fired, which, he said, would disturb it, and the timberman left it in that

condition, trusting to the loader to secure it afterward. The timberman did not return to the place or give any further attention to the matter, and was not at the mine the following day when the accident happened. On that morning the loader put up a cross-piece under the hanging slate across the track and supported it by a post at each end. He was an experienced miner but was not employed for that kind of work, and he called a machine runner to see if he thought the timbers were all right. They concluded that it was safe, and left it. Plaintiff began work about seven o'clock in the morning, and had made six trips before he was hurt, at about eleven o'clock. When he was injured he started from the face of the coal, walking close at the side of the mule. The mule had sore shoulders, and when the car struck the sudden rise from the temporary to the permanent track, or at about that place, the sore shoulders were hurt and the mule flinched and balked, and plaintiff stepped back to the car and tried to hold it and assist the mule. The car ran back, and in some way a prop was knocked down, letting down the cross-bar, and the slate, weighing several tons, fell on the plaintiff between the mule and the car, cutting the chain by which the car was drawn and injuring plaintiff. The fact that the slate fell between the mule and the car shows that the car had reached the post, wherever it may have been located with reference to the end of the permanent track. There was evidence that the props were usually set about two feet from the rail, and that the prop knocked down was from a foot to a foot and a half from the rail. The car extended outside of the rail and was old, and had a play of about six inches between the axle and the wheels. There was no direct evidence as to how the prop was knocked down, the only testimony on that subject being that of plaintiff, which was hearsay, and was stricken out by the court.

We think it apparent that the ruling of the court was right in refusing to direct a verdict for the defendant.

Either the prop fell down of itself or was knocked down by the car while on the track, and setting a prop in such a manner that either would occur was evidence tending to prove a want of reasonable care on the part of the defendant. The inference most favorable to the defendant is that the prop was knocked down by the car, owing to the play between the axle and wheels and the lurching of the car when the mule balked.

It is also argued that the rules of the company offered in evidence exempted it from liability to the plaintiff. Section 32 of the Mining law of 1899 is as follows: "It shall be the duty of every operator to post, on the engine house and at the pit top of his mine, in such manner that the employees in the mine can read them, rules not inconsistent with this act, plainly printed in the English language, which shall govern all persons working in the mine. And the posting of such notice as provided shall charge all employees of such mine with legal notice of the contents thereof." (Laws of 1899, p. 324.) By that section it is made the duty of the operator to promulgate and post rules for the conduct of his business and the government of his employees. The duty of the operator to establish and post the rules and the duty of the miner to obey them are reciprocal. What counsel calls rules, which were offered in evidence in this case, are merely notices and statements designed to relieve the defendant from its duties and liabilities to its employees. With one exception they are not in the nature of rules contemplated by the statute as to the manner of conducting the business nor regulating the employees. They consist of a notice that the business is dangerous and every employee must take constant care to avoid injury; that persons accepting employment do it with full notice that the danger to injury from falling roof and coal is one of the usual risks of the service; that the manager does not assume that the place to which an employee is ordered is not dangerous, but every place in the mine is

dangerous, and the duty of ascertaining the danger and avoiding it is on the employee, and that no employee is authorized to incur any risks relying on the timberman, and defendant, by employing timbermen, does not agree to secure the roof of the mine. They are nothing but an attempt to make laws under the guise of rules, and so far as they are claimed to operate as a contract against the negligence and dereliction of the defendant they are void, as against public policy. (14 Am. & Eng. Ency. of Law, 910.) The eleventh rule is the only one that purports to govern the duties of employees, and it provides that the timberman shall have no duty except to retimber places in the mine which have once been properly timbered and secured, and that in no case shall he assume the duty of securing the roof except as therein provided, unless expressly directed to do so by the mine manager. The fact that it provides the timberman shall not perform a duty resting upon the defendant furnishes no exemption to it. It was the duty of defendant to have the roof over the track where plaintiff was required to work properly timbered and secured, and we apprehend it would scarcely be claimed that defendant could make a rule that it would not perform the duty or furnish any one to do it. It was the duty of the defendant, whether discharged through the agency of the timberman or some other person.

In the course of the argument as to the propriety of directing a verdict, it is incidentally said that the second instruction given at the request of the plaintiff is erroneous because it ignores a provision of the statute which relieves the operator of the coal mine from securing the roof at the place where coal is being mined, and only requires him to provide props, caps and timber to the miner to secure the place where he is working. The dangerous roof in this instance was not where miners were working, but was where they were in no danger from it. It was

over the track, where the miners were not called upon to put up props, and the instruction was right.

No other error is alleged, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

JAMES O'HARA

v.

JOHN MURPHY.

Opinion filed April 16, 1902—Rehearing denied June 10, 1902.

1. LIMITATIONS—*when new promise sufficiently identifies the debt.* A promise, made by the debtor after suit begun to recover for services for a period of years, to pay the plaintiff "every cent he owed him," identifies the debt with sufficient certainty, in the absence of proof that there was any debt or account between the parties other than the one sued upon.

2. SAME—*new promise not to be construed as applying only to portion of debt not barred.* A promise by the defendant to a suit to recover for services for a period of years to pay the plaintiff every cent he owed him, will not be construed as applying only to such portion of the debt as is not barred by the Statute of Limitations.

3. SAME—*new promise is sufficient though amount is not fixed.* A new promise to pay a debt barred by the statute is sufficient, although it does not specify the amount to be paid, where the amount due is a matter of computation, which has not yet been made.

4. SAME—*when new promise is not made to a stranger.* If a debtor, after being sued, sends for a third party and directs her to tell the plaintiff that he will pay him every cent he owes him, the new promise is not made to a stranger, since the debtor makes the third party his agent to communicate the promise to the plaintiff.

O'Hara v. *Murphy*, 96 Ill. App. 577, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Christian county; the Hon. TRUMAN E. AMES, Judge, presiding.

This was an action of assumpsit brought by appellee, against appellant, in the circuit court of Christian county. The evidence showed that the appellee, John Murphy,

came to this country from Ireland in 1873, and went to live with appellant, James O'Hara, who had married his (Murphy's) sister; that he lived with O'Hara, working for him on his farm, until 1899, when they had a disagreement and appellee quit O'Hara's service. It appears that in 1880 they had a settlement, and that $50 was then due appellee; that they then made a contract by which O'Hara was to pay appellee as much per month by the year as other farm hands in the neighborhood were paid; that during the time appellee worked for appellant the latter promised appellee that he would purchase forty acres of land for him; that no settlement had since been made between them; that appellee received about $50 each year in money and clothing from appellant, but that neither of the parties kept any books or accounts in regard to the matter; that appellee lived in appellant's family, and that his washing and mending were done there; that at the time they had their disagreement and appellee quit, appellant told him he would pay him; that he would settle up with him and pay him every cent he owed him; that he did not want a cent of his money or anybody else's; that his word of honor was as good as his note, and that appellant made a similar statement about three years before to appellee. After this suit was brought appellant sent for appellee's sister, Margaret Carney, and told her to tell appellee he would settle with him and pay every cent he owed him. Appellant pleaded the Statute of Limitations and denied the contract and the promise to pay. The jury found for appellee and rendered a verdict for him, assessing his damages at $2691, which verdict was set aside, and on a new trial a verdict for $2355 was rendered and judgment entered on the same. On appeal to the Appellate Court for the Third District the judgment was affirmed, and appellant has further appealed to this court.

HOGAN & DRENNAN, for appellant.

J. C. & W. B. McBRIDE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellant insists that the judgment should be reversed on the grounds that the contract alleged by the appellee is not supported by sufficient evidence, that the claim is barred by the Statute of Limitations, and that the trial court erred in giving and refusing instructions.

It is said by counsel that appellee lived with appellant as a member of his family, and that his special contract for pay for his services was not proved. There was sufficient evidence to go to the jury on this question, and we have no power to reverse the judgment of the Appellate Court affirming the finding below.

Appellant offered an instruction containing the statement "that there is no sufficient evidence to take this case out of the Statute of Limitations as to that part of the account or demand claimed to have accrued or been earned five years or more before the bringing of this suit," and directing the jury not to consider any services for such period, which instruction was refused. The point is argued at length by appellant, and we have examined the authorities cited in support of the argument, but they do not sustain his contention. Appellant's statement that he would settle up with appellee and pay him every cent he owed him identified the debt with sufficient certainty, as there was no proof that there was any other debt or account running between them other than the one sued on, and was sufficient to authorize the jury to find the new promise alleged.

Appellant insists that even if it be conceded that he said he would pay every cent he owed appellee, that could be construed to mean only such a debt or amount as was legally due, and would apply only to the portion not barred by the statute. We do not understand the rule of law to be, that before a new promise can avail to renew a debt barred by the statute the attention of the

debtor must be called to the fact that the debt is barred. Nor can it be said that a debt barred by the statute is not a legal debt. It is not enforceable if the debtor plead the statute, but the statute does not make it illegal. If it were illegal it would not be a consideration for a new promise. A new promise is sufficient although the amount to be paid is not fixed. (*Schmidt* v. *Pfau*, 114 Ill. 494.) The amount could not be stated in the promise in this case because it was a matter for computation, and the computation had not yet been made. On this promise it was proper to submit all matters in dispute to the jury to ascertain what was the amount owing to appellee, which amount appellant had promised to pay. Nothing was said or done at the time rebutting the presumption of a promise to pay, and *Wachter* v. *Albee*, 80 Ill. 47, *Norton* v. *Colby*, 52 id. 198, and *Ennis* v. *Pullman Palace Car Co.* 165 id. 161, cited by appellant, are therefore not in point. It is true, appellant denied the new promise, but the jury and the Appellate Court have found the facts against him. Nor was the promise testified to by Mrs. Carney a promise made to a stranger. She testified that appellant sent for her and told her to tell appellee that he would pay him every cent he owed him, thus making her appellant's agent for the purpose of communicating this promise to appellee. The question whether or not there was a new promise was for the jury. *Miller* v. *Cinnamon*, 168 Ill. 447.

The instructions, taken together as a whole, state the law on the subject with sufficient accuracy, and what was proper in the refused instructions was embodied in those given.

The judgment must be affirmed.

Judgment affirmed.

Mr. JUSTICE RICKS, having been of counsel in this case in the court below, took no part in its decision here.

ANNIE M. YOUNG *et al.*

v.

THE PEOPLE *ex rel.* S. B. Raymond, County Treasurer.

Opinion filed April 16, 1902—Rehearing denied June 10, 1902.

SPECIAL ASSESSMENTS—*when improvement constructed is essentially different from the one authorized.* If a paving ordinance calls for a foundation layer six inches deep of the best quality of broken limestone, the board of improvements and the city have no power, after confirmation, to change the foundation layer to a seven-inch layer of rolling-mill slag, and where such change is made and the improvement constructed accordingly the objection is available upon application for sale. (*People* v. *Whidden*, 191 Ill. 374, explained.)

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

YOUNG, MAKEEL, BRADLEY & FRANK, for appellants.

WILLIAM M. PINDELL, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment and order of sale entered by the county court against the lands of appellants to satisfy the first installment in a special assessment levied to pay the costs of paving One Hundred and Nineteenth street, from Wentworth avenue to Michigan avenue, in the city of Chicago. The ordinance provides, among other things, that upon a roadway in said street, after being curbed and graded to a certain grade established in said ordinance, there should be spread, as a foundation layer for said pavement, a layer six inches deep of the best quality of broken limestone. After the confirmation of said assessment the board of local improvements of said city changed the nature and character of said improvement, and thereafter, said city joining them, let a contract for the construction of the improvement, substituting a seven-inch layer of rolling-mill slag in place of the six-inch foundation layer of limestone required by

the ordinance. The contract for the improvement offered in evidence requires the use of slag. The ordinance in evidence provides for a foundation layer, six inches deep, of the best quality of crushed limestone. Appellee admits that through a mistake of the engineer slag was provided for in the specifications instead of crushed limestone, and attempted to show that the durability of the two materials was the same and the cost substantially the same. No limestone whatever was used in constructing the foundation, but instead such foundation was made entirely of rolling mill slag, and the evidence also shows that the market price of slag was considerably lower than that of crushed limestone, the testimony of two witnesses varying considerably upon what the difference was, one placing the difference at twenty cents per cubic yard and the other at sixty cents per cubic yard.

Appellee places great stress upon the case of *People* v. *Whidden*, 191 Ill. 374, and practically rests its whole right to a judgment upon it. We think, however, that appellee has a false impression of the case, and that a reading of it will bear out the contention of appellant. The *Whidden case* was reviewed in the case of *Gage* v. *People*, 193 Ill. 316. In the latter case the objectors contended that the work done was not the work provided for in the ordinance, and that the alleged improvement was a different and another improvement than that specified therein. The objectors offered to prove by civil engineers that the roadway as constructed was another and different one from that required by the specifications in the ordinance. The proof was refused and the testimony rejected by the lower court upon his understanding of the rule announced in the *Whidden case*, and we held that the *Whidden case* did not sustain the court's ruling. Stating the rule announced by Cooley on Taxation we said, on page 318: "In general, no defense to an assessment that the contract for work has not been performed according to its terms is allowed. But this doctrine must be con-

fined within the proper limits. It cannot be extended to cover a case in which the authorities, after contracting for one thing, have seen fit to accept something different in its place, for if this might be done the statutory restraint upon the action of local authorities in these cases would be of no more force than they should see fit to allow." And we further said: "This rule is reannounced in the case of *People* v. *Whidden*, *supra*, in the following language: 'The rule that objections to the manner in which an improvement is completed are not available on the application for judgment for sale does not extend to cases where the improvement authorized is changed for another, or where the city authorities accept a different improvement from the one for which the assessment was levied.'"

A valid ordinance lies at the foundation of a proceeding of this nature, and the ordinance must specify the nature, character, locality and description of the improvement, and unless this is done the improvement can not be paid for by special assessment. (*Pells* v. *People*, 159 Ill. 580.) In this case the ordinance provides for a six inch foundation of crushed limestone. There was no ordinance whatever authorizing the construction of a street with a foundation of slag. The improvements are essentially different, and the ordinance providing for a pavement constructed of crushed limestone, the city could not abandon such improvement, substitute another and enforce the judgment of confirmation by a sale. A municipality cannot obtain authority to construct an improvement and assess an owner, and then construct another and different improvement and acquire a lien upon the property to pay for it. (*People* v. *Whidden*, *supra*.) The improvement as constructed under the contract being essentially different and another improvement than that called for in the ordinance, the appellants cannot be compelled to pay for the same by special assessment. This defense arising subsequently to the confirmation of

the assessment may be set up when the collector seeks judgment. *Pells* v. *People, supra.*

The objections of appellants should have been sustained. Neither is the judgment rendered in this case a proper one. A judgment substantially the same was condemned in *McChesney* v. *People,* 174 Ill. 46.

The judgment of the county court is reversed and the cause remanded. *Reversed and remanded.*

THE WABASH RAILROAD COMPANY
v.
THE PEOPLE *ex rel.* Samuel M. Funk, County Collector.

Opinion filed April 16, 1902—Rehearing denied June 10, 1902.

1. TAXES—*when assessment as for "omitted taxes" cannot be sustained.* An assessment against a railroad company as for "omitted" school taxes is not authorized by sections 278 and 279 of the Revenue act, where all school taxes levied upon the property during such years have been paid to the district for which they were levied although the levy was made for the wrong district, and where all school taxes levied for the right district have been extended against other property than that of the railroad company and been paid. (*Ohio and Mississippi Railway Co.* v. *People,* 123 Ill. 648, followed.)

2. SAME—*county court cannot perform assessor's duties on application for sale.* If the local assessor, in making an assessment against railroad property, fails to so describe the property assessed as to show that it does not embrace any property properly assessable as "railroad track," the county court, on application for judgment of sale, has no power to classify the property as "railroad track" and real estate other than "railroad track," apportion the taxes according to such classification and render judgment for the amount it finds properly due upon real estate other than "railroad track."

3. APPEALS AND ERRORS—*when objection that an appeal was improperly allowed comes too late.* An objection that an appeal was improperly allowed comes too late where no motion was made to dismiss the appeal, briefs are filed by both parties and the case is submitted to the court for decision upon the errors assigned.

APPEAL from the County Court of Piatt county; the Hon. F. M. SHONKWILER, Judge, presiding.

C. N. TRAVOUS, (W. E. LODGE, of counsel,) for appellant.

GEORGE W. FISHER, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application in the county court of Piatt county for a judgment of sale against certain railroad property of appellant, situated in the east half of sections 25 and 36, in township 17, range 5, in said county, reported delinquent for omitted school taxes in school district No. 2, in said township, for the years 1892 to 1898, inclusive; also against the north-west quarter of the north-east quarter and the north half of the north-west quarter of section 24, in said township, for alleged delinquent taxes for the year 1900. The appellant appeared and filed various objections to the application for judgment, but the court overruled all of its objections and rendered judgment against its property located in the east half of sections 25 and 36 for $1822.78 for omitted school taxes for said seven years; also for $26.48 against the north-west quarter of the north-east quarter, and $33.07 against the north half of the north-west quarter of section 24, for delinquent taxes for the year 1900, and the record has been brought to this court for further review.

It appears from the evidence introduced on the hearing in the county court that appellant's railroad runs through the east half of said sections 25 and 36; that prior to the year 1892 the east half of said sections was within the limits of school district No. 4 in said township 17; that in April, 1892, the boundaries of the school districts in said township were so changed that the east half of said sections became a part of school district No. 2, and so continued during the years in question; that notwithstanding such change the county clerk of said county continued to levy the taxes for school purposes against appellant's property in the east half of sections

25 and 36 for the years 1892 to 1898, inclusive, in favor of school district No. 4, of which district the east half of sections 25 and 36 had formerly been a part; that appellant's property in said sections 25 and 36 was assessed for the years 1892 to 1898, inclusive, for State, county and township purposes, including school taxes in said district No. 4, and were paid by appellant, and that the school taxes so levied and collected were turned over to and received by district No. 4; that during the years 1892 to 1898, inclusive, the taxes for school purposes levied by school district No. 2 were extended against property in that district other than that of appellant located in sections 25 and 36, and paid in full by those persons against whose property it was extended, and turned over to school district No. 2, and that said district No. 2 has received in full all of the school taxes levied in said school district for said years from persons other than appellant, and that the purpose of this proceeding is to obtain judgment against the property of appellant located in the east half of sections 25 and 36, as omitted property, for the taxes which should have been assessed against its property located in said sections for the years 1892 to 1898, inclusive, in favor of school district No. 2.

It is first contended that the judgment of the county court may be sustained under sections 276 and 277 of the Revenue law. (Hurd's Stat. 1899, p. 1441.) Section 276 is as follows: "If any real or personal property shall be omitted in the assessment of any year or number of years, or the tax thereon, for which such property was liable, from any cause has not been paid, or if any such property, by reason of defective description or assessment thereof, shall fail to pay taxes for any year or years, in either case the same, when discovered, shall be listed and assessed by the assessor and placed on the assessment and tax books. The arrearages of tax which might have been assessed, with ten per cent interest thereon, from the time the same ought to have been paid, shall be

charged against such property by the county clerk." The railroad property of appellant located in the east half of said sections 25 and 36 was not omitted in the assessment, as it was assessed in each of the years of 1892 to 1898, inclusive. All taxes levied upon said property during those years were paid and there was no defective description of said property. The section above quoted does not, therefore, authorize the assessment of said property as omitted property.

Section 277 is as follows: "If the tax or assessment on property liable to taxation is prevented from being collected for any year or years, by reason of any erroneous proceeding or other cause, the amount of such tax or assessment which such property should have paid may be added to the tax on such property for any subsequent year, in separate columns designating the year or years." No school tax having been levied on the property during the years in controversy in favor of school district No. 2, and the tax levied thereon in favor of district No. 4 having been paid, there was no tax on said property to be prevented from being collected by reason of an erroneous proceeding or other cause, as specified in said act. There is, therefore, no authority contained in this section which will authorize the assessment of school taxes in favor of school district No. 2 upon said property for the years in controversy.

In *Ohio and Mississippi Railway Co.* v. *People*, 123 Ill. 648, the highway commissioners of a township located in Wayne county from 1875 to 1883, inclusive, levied the necessary road taxes annually upon all the taxable property in their town, except the property of the Ohio and Mississippi Railway Company, which was overlooked. In 1886 the omission was discovered, and the commissioners then made out lists for the several districts, of the property of said railway company for each year from 1875 to 1883, inclusive, and ordered that the road taxes for said years be levied against the property of the com-

pany, which were extended accordingly. It appeared that the railroad was assessed for each of said nine years for State, county and township taxes, except district road taxes, and that it paid in each of said years all taxes assessed against it. It was held that as said railroad property was not omitted in the assessment for any year or number of years, as all taxes levied upon the property had been paid each year, as there was no defect in the description of the property, and as no road tax had been assessed or levied upon the property during the nine years, sections 276 and 277 of the Revenue law did not authorize the assessment of said property for the years 1875 to 1883, inclusive, as omitted property, and the tax was defeated. That case is conclusive against the right of school district No. 2 to assess appellant's property in the east half of sections 25 and 36 for the years 1892 to 1898, inclusive, as omitted property.

The record shows that school district No. 2 has collected all the taxes levied by it for the years of 1892 to 1898, inclusive, and it is of no consequence that taxes which might have been charged against appellant's land were charged against other lands, provided such taxes have been paid. Payment satisfies the taxes and discharges the land and the owner, (*Morrison* v. *Kelly*, 22 Ill. 610; *Hudson* v. *People*, 188 id. 103;) and the full amount of the levy, as made by the district, having been paid, no right exists to recover more than the amount levied. *Walser* v. *Board of Education*, 160 Ill. 272.

The property located in section 24 is used, at least in part, for right of way purposes by appellant, its main and side-tracks, station, freight house, cattle chutes, etc., being located thereon, and was returned by appellant as "railroad track," and assessed by the State Board of Equalization as such for the year 1900. It was also assessed for said year by the local assessor, the taxes for which application for judgment of sale was made being those based upon the assessment made by the local as-

sessor. On the application for judgment the county court undertook to apportion the taxes based upon the assessment of the local assessor by deducting from the assessment made by him the proportion of each of said tracks which it deemed was properly assessable as "railroad track," and after making such reduction rendered judgment for the amount of taxes which it found to remain due. If any portion of the lands of appellant in section 24 was not used by it as "railroad track" within the meaning of the Revenue law, it should have been assessed by the local assessor. In making said assessment he should, however, have so described the lands as not to have embraced therein any portion thereof which was properly assessable as "railroad track," otherwise a portion of the land of appellant would have been made liable to a double assessment. This he failed to do. The court, under the constitution, upon application for sale, had no power to make an assessment for taxation, and the attempt to separate said lands by classifying them into "railroad track" and real estate other than that denominated "railroad track" was made without authority of law; nor could the court apportion the taxes upon the basis of said classification so as to enable it to render judgment for the amount which it found properly due upon said real estate other than that denominated "railroad track." *Chicago and Alton Railroad Co.* v. *People*, 99 Ill. 464.

It is objected by the appellee that the appeal in this case was improperly allowed. No motion was made to dismiss the appeal, briefs were filed by both parties and the case submitted to the court for decision upon the errors assigned. The objection comes too late. *Eggleston* v. *Royal Trust Co.* 192 Ill. 101.

The judgment of the county court is reversed.

Judgment reversed.

THE WORLD'S COLUMBIAN EXPOSITION
v.
WILLIAM J. LEHIGH.

Opinion filed April 16, 1902—Rehearing denied June 10, 1902.

1. FELLOW-SERVANTS—*relation does not depend upon acquaintance.* Servants of the same master who are co-operating in the same work at the same time, under such conditions and circumstances that they may exercise an influence over each other promotive of proper caution for their own safety, are fellow-servants, irrespective of their acquaintanceship with each other or the length of time they have worked together.

2. SAME—*when relation of fellow-servants exists.* Where a large number of men employed by the same master through the same foreman and controlled by the same assistant foreman are engaged in painting the interior of a building, each gang of two or three doing the same kind of work and using the same kind of scaffolds, and working together indiscriminately for several weeks, the men composing two gangs working side by side on adjacent scaffolds are fellow-servants, so that the negligence of a member of one gang in unfastening a rope and allowing the scaffold on which the other gang was working to fall, cannot be imputed to the master.

World's Columbian Exposition v. *Lehigh*, 94 Ill. App. 433, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

O. W. DYNES, for appellant.

J. WARREN PEASE, (S. W. POLKEY, of counsel,) for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county for $2000 in favor of appellee, William J. Lehigh, against appellant, in an action on the case for personal injuries alleged to have been occasioned by the negligence of appellant's employee, who, it is averred in the declaration, was not a fellow-

servant of appellee. At the close of all the evidence appellant moved the court to exclude the evidence offered on behalf of the plaintiff and to instruct the jury to find the defendant not guilty, and offered an instruction to that effect, which the court refused to give.

Two grounds are urged for reversal, the first being the refusal of the court to give the instruction directing a verdict for defendant; and second, the refusal to give an instruction telling the jury that appellee was not entitled to recover upon the second count of his amended declaration. As to the second ground, it is only necessary to say that that count in the declaration was dismissed on the calling of the cause for trial and no evidence was offered under it, and there was no occasion for giving the instruction.

Under the first contention, the case really depends upon whether appellee and one John Smith Elisius, commonly called and hereinafter referred to as Smith, were fellow-servants. The facts are not disputed. Appellant offered no evidence except three photographs of a model exhibited by appellee to the jury and used in the progress of the trial. All the witnesses agree substantially as to every material fact upon which there is any evidence. From the record it appears that appellee, a painter and calciminer, was on January 7, 1893, engaged in painting in the Manufacturers' building, on the World's Fair grounds, in the city of Chicago. This building was about 1700 feet long by 800 feet in width and covered nearly forty acres of ground. There were at that time and place about one hundred persons employed whose work was similar to that of appellee, all under the same foreman and the same assistant foreman. A part of this force of painters was engaged where it was necessary for them to use scaffolds or stages, which were suspended from beams by ropes and pulleys, so that they could be lowered to the desired height by the painters using them. They were hung by riggers or sailors, who were familiar

with the handling and tying of ropes. These stages were made by suspending ladders horizontally, with boards or planks upon their upper surface, and were about twenty-five feet in length, supported at each end by ropes and tackle. There were about thirty of these stages in use in this one building, and they were hung adjacent to each other. Upon each of these stages, when in use, were sometimes two but usually three men, called a "gang." At the time of the accident there were but two men on the stage where appellee was,—appellee and one Bell. On the next stage south of them there were three men. Each gang painted a "stretch" or strip of about the same width as the length of the stage upon which they worked. In this way the stretch painted by one gang would meet at the end with the stretch painted by the next gang. The members of a gang might be changed at any time, but usually the personality remained the same where the members were found to work well together. The gangs, however, were changed from place to place and from one stage to another. When a stage was lowered to the floor the painters would go to another stage which had already been hung by the riggers and begin painting, while the riggers would remove the lowered stage to another place and make it ready for the painters. The business and employment of appellee was the same as that of the other painters. Each had his own brush and bucket while at work, but at night they were all put together, and the next morning each man selected one for himself without regard to whether he had used it the day before or not. The appliances were all rigged in the same manner and used interchangeably by the men. Appellee had worked in this same building for about five weeks, prior to which time he had worked in the Mines and Mining building, where he and Bell had also worked together. A gang, in working, would be arranged, one man at each end of the stage and one in the middle. The end men steadied themselves by holding to the suspension ropes, and the

middle man was provided with a "life line" or rope suspended from some support directly above him. At the time this accident occurred the men were painting the sloping interior of the roof, and thus it was necessary to keep moving the stages nearer the side of the building as the painters descended, in order that they might keep within reaching distance of the space to be painted. Each gang, independently, performed this shifting of their respective stages. In this work of shifting stages the duties of each gang were confined to their own stage and the stages shifted independently of each other, and the men of each gang arranged the work to be done in shifting between themselves. No particular man was assigned by the foreman or assistant foreman to any particular position or duty on the stage. The day of the accident the stage on which appellee was working and the stage next south, on which one Smith was the middle man, extended north and south in a line with each other. The Smith gang, consisting of three men, had worked for several weeks together. At the time in question appellee's gang consisted of himself and one Bell, their middle man not being with them on this afternoon. Smith and appellee were unacquainted with each other, and they were unable to say whether they had or had not worked on adjacent stages before that particular time. These two gangs had begun work on their respective stages after lunch on the day of the accident. When it became time for the Smith gang to shift their stage, the two stages were not even, some witnesses placing appellee's stage five to twelve feet below Smith's and others placing appellee's stage slightly above Smith's. Appellee's stage was about thirty-five feet from the floor of the gallery. While appellee and his co-worker, Bell, were engaged in their painting, Smith went aloft to untie the ropes of the stage on which he was working, preparatory to shifting it, but instead of untying the proper rope he untied the rope attached to appellee's stage, causing it to drop some

distance, which caused appellee to fall to the floor below, causing the injury complained of. It further appears that this work was being done during cold weather, and the large building in which they were working was being heated by salamanders. The men, at the noon hour, ate their lunches in the building, gathering around these salamanders, of which there appeared to be a number, and warmed their tea, and such other things as they cared to, over them.

The only variance in the testimony of appellee's witnesses was as to a single proposition. All agree that at the time the stages or scaffolds were hung, on this particular day, they were in line and of the same height, and the evidence shows that appellee and Bell began work a little sooner than what has been designated the Smith gang. Smith testified that at the time of the injury appellee's stage was about five feet higher than the stage which he was upon, while appellee, and Broderick, the assistant foreman, and Olson, one of Smith's gang, testified that the Smith stage was lower than that of appellee; that upon appellee's stage there were but two men working while upon the Smith stage there were three; that the stretches, or amount of work to be done by the men upon each stage, were the same, and that as the Smith stage had three men upon it they worked faster and accomplished the work more quickly than the two men on the stage of appellee, and passed them in their downward course and reached the point for shifting before appellee's stage reached that point. This seemed the more reasonable view and is the evidence of appellee himself.

Upon this state of facts the question arises, were appellee and Smith fellow-servants, within the meaning of the law? And this is the only question, for it is not pretended or insisted that Smith was not a thoroughly competent man or that the appellant was guilty in any manner in failing to furnish a safe place to work or

proper material and machinery to work with, so that if Smith was a fellow-servant with appellee then this case should be reversed, otherwise it should be affirmed. They were employed by the same master, through the same foreman, Hunt, and were controlled and operated under the same assistant foreman, Broderick, in the same building where they had been working together or at the same thing at least for five or six weeks, where all the men, about one hundred in number, were doing the same kind of work upon the same kind of scaffolds. No particular man or set of men were identified for any definite length of time with any scaffold or any tool or appliance used by them in the work, except when they were actually doing the work they were strung along the building, divided into gangs of three, for the convenience of doing the work. They were simply, as we look upon them, all one hundred men doing the same thing in the same place at the same time. Appellee's evidence shows that every man engaged at that work was a competent man, especially acquainted with that class of work and especially employed to do that class of work because of his acquaintance with and ability to do it; that the manner of doing the work was such that no man or set of men, except for and when shifting the stages, had any particular or given place to work; that one time a gang would be upon a scaffold having two other gangs, one on each side, doing the same thing and the same class of work as was being done upon the occasion in question, and when the ground was reached with those scaffolds or stages and the stretch completed, such stage and place were left by the gang and another stage and place occupied, so that there was constant change and intermixture of all those men from the time appellee and his gang went in there, which was some five or six weeks before the injury, to the time it occurred. At the particular day and time appellee had gone to the stage in question and gone to work, as the evidence tends to show, immediately

after, or possibly a little before, luncheon time, and Smith and his gang followed soon after; that when appellee went to his stage the Smith stage was hanging on the same plane and end to end with it, and close enough to it that he and the end man on the north end of the Smith stage would be close enough together that each of them would paint a part,—one-half of the sides,—of an eight-inch-square column that formed the dividing line between their two stretches; that there was no obstruction between the stages, but that the men along the entire line, from one stage to the other, could be seen by the occupants of any of the stages; that during the work on this stage the Smith gang, beginning their work later than the gang of appellee but having more men at work, passed appellee in the descent, so that Smith, when he left his stage to go to the beam above to make the shift and loosen the sling, was in full view of Lehigh if he cared to pay any attention to him, and must have passed him in the ascent to the beam above, where the sling was attached. When at the beam, the evidence shows that he was in full view of Lehigh and all the occupants of the stage if they would look in that direction, and the two stages being so close together, as the evidence shows, that the fastenings from the beam above that held the tackle and stages in place were necessarily placed close together, often crossing each other, as in this instance. These matters were in the knowledge of all these men. The riggers or sailors, only, hung the ladders or scaffolds in the first instance, and from that time until the gangs got to the floor or through with their stage each gang took care of and shifted its own ladder or stage. The particular work that all of these men were engaged in was painting or calcimining this building, and in doing it, and as a part of it, they shifted their scaffolds or stages as they passed down the circular ceiling to keep near enough to the surface to apply their colors. Of this shifting appellee says:

Q. "In shifting the scaffolds, as it was necessary to shift them in painting along the under side of the roof, was it the painters that shifted them themselves? They did that sometimes, did they not?

A. "Oh, yes; after the scaffold was put up the first time they shifted it till they came to the ground or until they were through with their portion of the work. They painted the whole interior—the whole ceiling; probably go down on the side wall, too.

Q. "And they would shift along as they needed to shift at the ceiling here?

A. "Yes, sir.

Q. "And as they were doing that work one of them would climb aloft and unfasten the rope, as Smith did at the time of the injury?

A. "Yes, whenever they shifted.

Q. "And fix it so that it could be shifted?

A. "Yes, sir.

Q. "You had done that yourself?

A. "Yes, sir.

Q. "In the way that Smith was doing it at the time of the injury, only you loosened the right rope?

A. "Yes, sir.

Q. "You had done that frequently, had you not?

A. "Yes, sir; and the other end man had frequently done that; but quite often the middle man would go up and we would stay at the stage and shift it on the beams.

Q. "And you had often seen the men on both sides shift their scaffolds?

A. "Oh, I never noticed them; I did not have time to notice them.

Q. "Well, they did it plain in sight of where you were?

A. "Yes, sir.

Q. "There was nothing to prevent you seeing them, except that you were too busy with your business?

A. "No.

Q. "The scaffolds in question,—the one on which you were working and the one on which Smith was working at the time,—were hanging in about the way those scaffolds had usually been slung, were they not?

Mr. Pease (counsel for appellee): "It is conceded that they were."

In *Pagels* v. *Meyer*, 193 Ill. 172, is found a review of the cases upon the question of fellow-servants, and among the latest declarations of this court as to the rule it is there said (p. 178): "It is settled beyond controversy that those, only, are fellow-servants whose duties imply association and co-operation, either habitually or at the time of the injury complained of. When their employment does not require co-operation and does not bring them together into such relation that they can exercise an influence upon each other promotive of proper caution they are not fellow-servants; but if they are brought together by directly co-operating with each other in a particular work at the time of the injury, or are by their usual duties brought into habitual association, they have the opportunity and power to influence each other to the exercise of caution by example and advice and by reporting delinquencies to the employer, and are fellow-servants. The basis of the classification of servants of the same master into those who are fellow-servants and those who are not, as established in this State, is such personal relation and association between them as affords opportunity and power to influence each other to proper caution by counsel, advice and example, or the want of such personal relation and association. Where they are brought together in direct co-operation in the performance of a particular work, as in this case, they have such opportunity and power and are brought within the relation required by the rule. Where their usual duties bring them into habitual association, the association must be sufficiently personal to furnish the same opportunity and power to exercise an influence upon each other promo-

tive of proper caution. This is the rule, in substance, as stated in all the cases in this court."

Such being the rule, and the question presented to us being one of law by the request of the instruction to direct a verdict, we feel constrained to hold, under the circumstances in this case, as shown by the record, that appellee and Smith, to whose negligent act appellee's injury was due, were fellow-servants. Smith testified as follows:

Q. "Prior to the time you untied the sling on the north end of the scaffold, did you make any examination to ascertain where that rope went or whose rope it was?

A. "No, sir.

Q. "If you had made an examination you could have ascertained that it was the sling that supported the end of Lehigh and Bell's scaffold?

A. "Yes, sir."

This testimony, taken together with the admission afterwards expressly made in the record that Smith was a competent workman, shows that the injury of appellee was one of those acts of occasional negligence on the part of a fellow-servant which is within the contemplation of the rule exempting the master from liability in such cases. *Illinois Central Railroad Co.* v. *Cox*, 21 Ill. 20.

It is insisted, however, that this evidence shows that these men were not personally acquainted with each other, and that it was not definitely shown that they had ever co-operated together in the particular work before. We may reply that it is not shown to the contrary either. They all testified that they were unable to say whether they had worked together or not. Smith, Olson and appellee all testified,—and they are three of the survivors that were on the two ladders,—that they did not personally know each other; that there was little effort made by the men to become personally acquainted. Smith testified that he was a Dane, and at that time had been but a short time in this country and did not try to become

acquainted with the men. We do not think, however, that the relation depends upon the accident of acquaintance or the length of time they had worked together. It is sufficient if they were co-operating in the same work at the same time, under such conditions and circumstances as that they could exercise an influence over each other promotive of proper caution for their own safety, irrespective of the time they had been working together. We cannot escape the conviction that the indiscriminate method of doing this work by this whole body of men in the particular and peculiar manner in which it was done constituted them all, during the progress of that work, fellow-servants, and with these ladders hung in the manner in which they were, to be shifted by the men upon their own volition and at such time and in such manner as seemed proper to them, each ladder and crew or gang upon it being so related to each other or the one next to it that a mistake or negligent act, such as happened in this case, or others that can readily be conceived, would almost inevitably result in injury to the person, constituted such condition as was calculated to create an incentive to the exercise of mutual care and caution. There was a necessary dependence on each other's care and vigilance for their mutual safety, and whether, under the rule, this body of one hundred painters should all be held to be fellow-servants, we are nevertheless constrained to hold that the two gangs—the Smith and Lehigh—working upon these adjacent ladders, at the time and in the manner they were when this injury occurred, were fellow-servants.

Such being our view, the judgments of the Appellate Court and the superior court of Cook county are reversed, and the cause is remanded to the superior court of Cook county for further proceeding not inconsistent with the views herein expressed.

Reversed and remanded.

THOMAS K. CONDIT
v.
ERNST P. WIDMAYER.

Opinion filed April 16, 1902—Rehearing denied June 10, 1902.

TAXES—*when collection of tax may be enjoined.* If a party appearing of record to be the owner of notes and mortgages on April 1 has in fact assigned the same, his refusal to disclose to the board of review the names of his assignees does not justify the board of review in assessing the assigned notes and mortgages to him, and the tax based upon such assessment may be enjoined.

MAGRUDER, C. J., and WILKIN, J., dissenting.

APPEAL from the Circuit Court of Cass county; the Hon. T. N. MEHAN, Judge, presiding.

MILLS & MCCLURE, (EDWARD CLIFFORD, of counsel,) for appellant.

C. A. GRIDLEY, State's Attorney, (A. A. LEEPER, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This bill, as amended, was filed in the circuit court of Cass county by the appellant, against the appellee, as collector of said county, to enjoin the collection of a tax of $915 extended by the county clerk of said county upon an assessment by the board of review of said county for the year 1901 upon $84,400 in notes, secured by real estate mortgages, which appeared of record in the recorder's office of said county in the name of appellant on April 1, unreleased and not assigned, and which he failed to return for assessment for that year.

It is averred in the bill that the appellant, on July 22, 1901, was notified by the board of review of said county to appear before it on the 29th of that month and show cause why his assessment of personal property for the

year 1901 should not be increased; that in response to such notice he appeared before the board of review, whereupon the board exhibited to him a list of mortgages which appeared of record in his name in said county, aggregating in amount $84,400, and interrogated him as to the ownership thereof on April 1, 1901; that in response to such interrogatories he stated to said board that he was not the owner of the notes secured by said mortgages, or any of them, on April 1, 1901; that all the notes secured by said mortgages had prior to that date been sold and transferred by him for value; that all of said notes were on that date owned and held by parties residing outside of said county with the exception of two, which aggregated the sum of $3000, and that on April 1, 1901, he had no interest, directly or indirectly, in said notes and mortgages, or any of them, and that they were not in his possession or under his control; that he was then asked to whom he had sold and transferred the notes secured by said mortgages, and upon his declining to give the names of the persons to whom said notes and mortgages had been sold and transferred by him said board of review raised his assessment $84,400; that the county clerk has extended the tax for 1901 thereon and the appellee was then attempting to collect said tax, and unless enjoined from so doing would levy upon and sell the property of appellant to pay the same.

It clearly appeared upon the hearing that on April 1, 1901, the appellant had no interest in the said notes and mortgages, or any of them; that $81,400 thereof belonged to one C. M. Lane, a non-resident of Cass county; that $500 thereof belonged to one John T. Walton; that $2500 thereof belonged to one Milton McClure; that the two last named persons resided in Cass county, and that the notes and mortgages owned by them, respectively, had been assessed for taxation in Cass county for the year 1901, and that the board of review raised the assessment of appellant $84,400, not because it was of the opinion

said notes and mortgages belonged to appellant on April 1, 1901, but because he refused to disclose to said board the names of the persons to whom he had sold and transferred the same. The circuit court found the issues in favor of the appellee and entered a decree dismissing the bill.

The board of review had no right to punish the appellant by raising his assessment for his refusal to disclose to it the names of the persons to whom he had sold and transferred said notes and mortgages. Neither had it the right to assess to appellant, for 1901, property of which he was not the owner on April 1 of that year. There is no law authorizing a board of review to impose a penalty upon a mortgagee who declines to disclose to it the name of his assignee, where the mortgage has been sold and transferred in good faith before April 1, by raising his assessment to an amount equal to the amount of the said mortgage; neither has it the right to assess one man's property to another, and when such an assessment is made the same is made without authority of law, and a tax based upon such assessment will be enjoined. (*Irvin* v. *New Orleans, St. Louis and Chicago Railroad Co.* 94 Ill. 105; *Searing* v. *Heavysides*, 106 id. 85; *Allwood* v. *Cowen*, 111 id. 481.) In *Irvin* v. *New Orleans, St. Louis and Chicago Railroad Co. supra*, property belonging to the Illinois Central Railroad Company was assessed to the Mississippi Central Railroad Company. A bill was filed to enjoin the collection of the tax, and it was held the assessment was made without authority of law, and the court enjoined the collection of the tax. In *Searing* v. *Heavysides, supra*, certain grain was assessed as the property of complainant but in which he had no interest, and it was held the tax levied on such assessment was levied without warrant of law, and the court restrained the collection of the tax. In *Allwood* v. *Cowen, supra*, it is said (p. 486): "The court has had frequent occasion to declare that chancery

has jurisdiction to enjoin the collection of a tax when it is levied without authority of law."

The decree of the circuit court is reversed, and the cause is remanded to that court with directions to enter a decree enjoining the collection of said tax.

Reversed and remanded, with directions.

MAGRUDER, C. J., and WILKIN, J., dissenting.

RICHARD SNELL

v.

CLINTON ELECTRIC LIGHT, HEAT AND POWER COMPANY.

Opinion filed April 16, 1902—Rehearing denied June 10, 1902.

1. CORPORATIONS—*electric light company must treat its customers without unjust discrimination.* A corporation organized to furnish electric light, heat and power does a business affected with a public interest, and while not bound, in the absence of statutory enactment, to treat all its patrons with absolute equality, it must treat them fairly and without unjust discrimination.

2. SAME—*when refusal to furnish transformer free is unjust discrimination.* Refusal of an electric light company to furnish light to a proposed patron unless he paid the cost of a transformer is unjust discrimination, where it appears that transformers were furnished free to all other patrons; nor is its refusal justified by the fact that it wired the houses of its other patrons for compensation, whereas the proposed patron had his house wired by other parties.

Clinton Electric Light, etc. Co. v. *Snell*, 95 Ill. App. 552, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

This was a petition for *mandamus*, filed in the circuit court of DeWitt county, to compel appellee to furnish appellant with electricity for lighting his house, as is alleged, upon the same terms and conditions that it required from its other consumers. The petition alleged

that appellee refused to connect its wires with appellant's house unless he would pay for a transformer or converter, in addition to the usual charge for electric lighting, which payment appellant refused to make on the ground that appellee did not require it of its other consumers but furnished them a transformer without any additional charge. A jury heard the evidence and found the facts specially. On the findings by the jury, and on the propositions of law afterward submitted and held, the court awarded the writ of *mandamus*. Appellee appealed to the Appellate Court for the Third District, which court reversed the judgment of the circuit court, and the petitioner appealed to this court.

The facts as found by the jury are, substantially, that appellant applied to appellee to furnish electricity for lighting his residence upon the same terms and conditions required by it from other consumers, and that appellee refused to do so; that appellee had not required other persons to pay for the use of transformers for dwellings, and that it was its general practice and custom to furnish the use of them free of charge for its customers; that it refused to furnish the use of a transformer to appellant because it had not been employed to wire his house, he having had such wiring done by one not connected with appellee; that appellee refused to connect with appellant's house on the ground that his residence was not properly wired, but the jury also found that such residence was properly wired; that appellee had furnished transformers free of cost to consumers in cases where it had furnished the wires and had done the wiring of the building for compensation, and that it considered the profits accruing to it therefrom to justify it in furnishing the use of transformers without a specific charge for them; that the object and purpose of a transformer are to protect the house from destruction by fire caused by too great a voltage of electricity, and the consequent destruction of the wires in the house.

A number of propositions to be held as law were offered by appellee, some of which were held as law by the court and some refused. One refused was: "Upon the findings of the jury the peremptory writ should be denied and judgment rendered against the petitioner (the appellant) for costs."

EDWARD J. SWEENEY, for appellant:

Gas and other companies which by their charters or contracts with municipalities enjoy practical monopolies, may be compelled, by *mandamus*, to furnish the commodity in reasonable quantity, on the same terms on which it is supplied to others, to one inhabitant who is willing to comply with such terms. 2 Spelling on Extraordinary Relief, 1303, 1304; 1 Abbott's Pr. 404; *People* v. *Manhattan Co.* 45 Barb. 136; *Telephone Co.* v. *State*, 118 Ind. 194; *Rogers Park Water Co.* v. *Fergus*, 178 Ill. 571.

Telephone companies must furnish equal facilities to all, and cannot discriminate against a person who tenders compliance with the rules established and followed as to other subscribers. 14 Am. & Eng. Ency. of Law, 163; *State* v. *Telephone Co.* 22 Alb. L. J. 363; *Transfer Co.* v. *Telephone Co.* 24 id. 283; *State* v. *Telephone Co.* 23 Fed. Rep. 539; *Telephone Co.* v. *Telegraph Co.* 66 Ind. 399; *Telephone Co.* v. *Commonwealth*, 3 Atl. Rep. 825; *Telegraph Co.* v. *Telegraph Co.* 66 Md. 399.

WARNER & LEMON, for appellee:

There is no statute of this State regulating the rights or prescribing the rules under which electric light companies shall do business, and in the absence of such statute such companies can fix their rates and establish their rules, subject only to the common law. *Zanesville* v. *Gas Light Co.* 23 N. E. Rep. 59; *Gas and Oil Co.* v. *State*, 34 id. 818.

Even in the case of railroad corporations, where they are regulated by statute, discriminations relating to any inequality of charge is not prohibited. What the law pro-

hibits in such cases is that kind of discrimination which is unjust or unreasonable. *Railroad Co.* v. *Coal Co.* 79 Ill. 121; *Railroad Co.* v. *People*, 67 id. 11; *Railroad Co.* v. *Gage*, 12 Gray, 393.

Corporations organized for the purpose of furnishing light are not public corporations in the sense in which railroads and common carriers are. They are rather of a *quasi* public nature, performing private service in lighting residences and buildings. *Gas Light Co.* v. *Brady*, 72 Am. Dec. 360; *Commonwealth* v. *Gas Light Co.* 12 Allen, 77.

Mr. JUSTICE CARTER delivered the opinion of the court:

The trial court evidently held that the law applicable to the facts as found by the jury justified the awarding of the writ, for it refused to hold the proposition of law submitted on that question by appellee, while the Appellate Court was of the contrary opinion, for it made no finding of facts different from those found by the jury and the court below. The only question here is, therefore, whether or not, upon the evidence as found, the appellee made an unjust discrimination against appellant in charging him for a transformer in addition to the regular rates for electric lighting.

There is no statute regulating the manner under which electric light companies shall do business in this State. They are therefore subject only to the common law and such regulations as may be imposed by the municipality which grants them privileges. At common law, whether or not a difference in the treatment accorded to different patrons amounts to a discrimination must depend upon the surrounding circumstances. A mere difference does not, of necessity, constitute unlawful discrimination. Appellee, in its answer to appellant's petition, avers that the purpose and office of a transformer is chiefly for the protection of the house or building connected with the electrical system; that it prevents an excessive number

of volts of electricity from passing from the main street wire into the building to be lighted; that the wires usually used inside a building are much smaller than the street wires and incapable of safely carrying so many volts of electricity as pass along the street wires; that if all the voltage carried on the street wires were turned into the residence, the natural consequence would probably be that the house wires would melt and the heat from the excessive voltage would cause a fire; that it is to prevent this result that a transformer is necessary. A transformer or converter is described by counsel as a coil of copper wire contained in a sheet-iron box, and is usually placed on a pole outside of the building. Its office is to reduce the current from the main line, or, rather, to induce a lesser current in the wire leading to the house for house use. In this case the voltage would have been reduced from one thousand volts to fifty or a hundred volts. It appears that without the use of a converter the effect of turning this large voltage into a house would be to burn up the wires, and in the formation of short circuits there would be great danger of fire, and that the object of the converter is the protection of the house. It is a necessary appliance for the safe lighting of houses. The appellee had been in the habit of furnishing transformers, as needed, without any extra charge, for all houses which were wired for electricity by it, but claimed the right to charge for transformers in cases where it did not do the wiring, as it made no profit on the wiring in such cases. The transformer is just as much a necessary appliance in lighting houses as the pole on which it is fastened, or the wire that carries the electricity, or the boilers and dynamo used in generating it. It is entirely immaterial who does the wiring of the house—the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes,—just as the putting in

of gas and water pipes into a house is a distinct business from furnishing the gas or water to flow through them.

The jury found that the appellee had not demanded extra pay for the use of a transformer from any one else, and that it was its general practice and custom to furnish them free to its consumers. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. While it is not bound, in the absence of statutory enactments, to treat all its patrons with absolute equality, still it is bound to furnish light at a reasonable rate to every customer and without unjust discrimination. In 29 Am. & Eng. Ency. of Law, 19, it is said: "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the line of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates." In commenting on this, the Supreme Court of North Carolina, in *Griffin* v. *Goldsboro Water Co.* 30 S. E. Rep. 319, says: "If this were not so, and if corporations existing by the grant of public franchises and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like, could charge any rates, however unreasonable, and could at will favor certain individuals with low rates and charge others exorbitantly high, or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. * * * The law will not and cannot tolerate discrimination in the charges of these *quasi* public corporations. There must be equality of rights to all and special privileges to none." In *Cincinnati, Hamilton and Dayton Railroad Co.* v. *Village of Bowling Green*, 49 N. E. Rep. 121, the Supreme Court of Ohio said: "The light and power company have acquired in the village rights that are in the nature of a monopoly. * * * Both reason and authority deny to

a corporation clothed with such rights and powers and bearing such relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. * * * The company was bound to serve all of its patrons alike. It could impose on the plaintiff in error no greater charge than it exacted of others who had used its lights." In *Owensboro Gaslight Co.* v. *Hildebrand*, and *Owensboro Electric Co.* v. *Hildebrand*, 42 S. W. Rep. 351, the Court of Appeals of Kentucky said: "Practically they have a monopoly of the business of manufacturing and furnishing gas within the corporate limits of the city. It is therefore their duty to furnish the city's inhabitants with gas, and to do so upon terms and conditions common to all, and without discrimination. They cannot fix a variety of prices or impose different terms and conditions, according to their caprice or whim."

It has been held at common law and in the absence of statutes, in the case of common carriers, that as long as they carry at a reasonable rate for every shipper, no one can complain if they are willing to carry for others at a less rate. (5 Am. & Eng. Ency. of Law,—2d ed.—179.) If we apply this rule to the case at bar, it will be noticed that the appellee has demanded of appellant *more* than it has of any of its other customers. This is not the favor allowed by the common law, as just cited, but an unjust discrimination. Appellee has discriminated unjustly against appellant in any view of the law and the circumstances that we can take, and it follows that the judgment of the circuit court was right.

The judgment of the Appellate Court will be reversed and the judgment of the circuit court affirmed.

Judgment reversed.

NELLIE KING HAYS

v.

THE ST. PAUL METHODIST EPISCOPAL CHURCH.

Opinion filed April 16, 1902—Rehearing denied June 6, 1902.

1. BUILDING RESTRICTIONS—*grantor may convey subject to such restrictions as he sees fit.* An owner may convey his property subject to such building restrictions as he sees fit, and if the grantee accepts the conveyance and the restrictions are not objectionable in law they will be enforced at the suit of one in whom the right to enforce them is vested.

2. SAME—*party must show right to enforce building restriction.* In a suit by a party, other than the grantor, to enforce a building restriction, the complainant must show that the intention of the restriction was to benefit her property, and such intention must be ascertained from the language of the deed, considered in the light of the surrounding circumstances.

3. SAME—*when building restriction will not be enforced at suit of third party.* A building restriction that no structure shall be erected on the lot "further east or nearer Ashland avenue than is the house or building immediately south of said property," will not be enforced in favor of the owner of the building so specified, where the only circumstance regarding her right to the benefit of the restriction is that the grantor in the deed was her father, who had given to her the house south of the property conveyed.

APPEAL from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

FLOWER, VROMAN & MUSGRAVE, for appellant.

ALTGELD, DARROW & THOMPSON, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On April 1, 1893, John A. King conveyed to the First Methodist Episcopal Church of Chicago vacant lots at the corner of Harrison street and Ashland boulevard, in the city of Chicago, having a frontage of eighty feet on Ashland boulevard. The deed contained the follow-

ing provision: "*Provided, however*, and this conveyance is made strictly subject to the condition, that no building or structure shall be built or erected on the land herein described and conveyed, further east or nearer Ashland avenue than is the house or building immediately south of said property." The deed was recorded September 11, 1893, and on that day the First Methodist Episcopal Church conveyed the premises to the Marshfield Avenue Methodist Episcopal Church in consideration of $32,500, without any building restriction, but upon the condition that they were to be used for church purposes of the Methodist Episcopal Church, and not to be sold or encumbered without the consent of the trustees of the First Methodist Episcopal Church. The Marshfield Methodist Episcopal Church is now the St. Paul Methodist Episcopal Church, the appellee. When the conveyance was made by John A. King, the appellant, Nellie King Hays, was the owner of the lot and house immediately south, mentioned in the deed, and continues to own the same. In the spring of 1901 the appellee proceeded to erect a church building on its premises. Appellant had then resided in California three years for the benefit of her health and her house had been occupied by tenants, but she had entertained an intention of returning to it. As the church was planned, the front wall of the main building was to be nine and one-half feet back of the front line of appellant's house, but in front of that there was to be a lobby, with halls nineteen feet high, the front wall of which would extend at the ground level five and one-half inches nearer the street than the front wall of appellant's house, and at the height of seven feet it would extend two and one-half inches nearer the street than that wall. There is a bay in the front of appellant's house, and there were to be two bays in the front of appellee's church which would extend three feet and two and one-half inches nearer the street than the bay of appellant's house. The bays in the church building were to be twenty-four feet

high. Appellant filed her bill in the superior court of Cook county, claiming the right to enforce the restriction contained in the deed of John A. King as being for the benefit of her house and lot, and asked the court to enjoin the appellee from constructing or erecting on its premises any building or structure further east or nearer Ashland boulevard than her house. On a hearing the bill was dismissed for want of equity.

It is not denied that the purchase from John A. King, and the acceptance of the conveyance subject to the provision contained in it, created a valid personal obligation to him. An owner has a right to sell and convey his property upon such terms and conditions as he may see proper, and if the terms are accepted by the grantee, and are not objectionable in law, they will be enforced at the suit of the one in whom the right is vested. (*Frye* v. *Partridge*, 82 Ill. 267.) If a subsequent owner has taken title with notice, either actual or constructive, of a binding agreement between his grantor and the original owner establishing a building restriction, he will be bound to abide by it and equity will enforce it. In this case there is no dispute that the defendant had notice of the building restriction from the recorded conveyance to the First Methodist Episcopal Church, and if it was imposed in favor of complainant's house and lot, and for the benefit of the same, complainant would have a right to enforce it. The question is whether, by the agreement between King and his grantee, defendant's lot was burdened with the restriction for the benefit of the complainant's lot, so that she can enforce the agreement. The restriction was imposed by John A. King and the agreement was with him. Complainant was a stranger to that transaction, and there was no covenant or agreement between her and the defendant or its grantor. Her right to enforce the agreement must depend upon her making it appear that it was entered into for the benefit of her lot. In making his conveyance John A. King had a legal right

to impose the condition from any motive, and it is immaterial what the motive was, and he could impose it in favor of property which he did not own and which belonged to complainant, if he saw fit to do so. When he executed his deed he did not own any other property in the block or in that vicinity. He did not own the lot or house south of the premises which he conveyed and had no interest in either. He had once owned the premises, and had conveyed them by warranty deed December 1, 1889, to the complainant, who is his daughter, and, as a matter of fact, the conveyance was a gift to her. There was no agreement outside of the deed, either between King and complainant or between either of them and the grantee. To establish complainant's right she must show the intention of the restriction to have been to benefit her lot, and this intention must arise out of the language of the deed, construed in the light of the surrounding circumstances. The intention is to be ascertained as in other cases,—not by learning some secret or unexpressed intention in the mind of King, but from the language of the deed itself, considered in connection with the circumstances existing at the time it was executed. (*Hutchinson* v. *Ulrich*, 145 Ill. 336.) The defendant is bound by what it had notice of, but not by secret intentions of King. If the deed, in the light of the circumstances, expresses an intention to give complainant's property the benefit of the restriction, she can enforce it in behalf of that property, otherwise not. In construing the provision, restrictions are not favored, although where the intent is clearly manifested the court will enforce them. When a fee is conveyed, limitations and restrictions upon the use of the property are not favored, and all doubts, as a general rule, are to be resolved against them. (*Eckhart* v. *Irons*, 128 Ill. 568; *Hutchinson* v. *Ulrich*, *supra*; *Ewertsen* v. *Gerstenberg*, 186 Ill. 344.) The defendant took the premises bound by the agreement, and can be restrained from violating it at the suit of any one having the interest.

(2 Pomeroy's Eq. Jur. sec. 689.) To establish such an interest, complainant must show that the restriction was made in favor of her particular lot, and that the circumstances were such as to impart to the defendant notice, from the terms of the deed, that such was the case. *Coughlin* v. *Barker*, 46 Mo. App. 54.

Questions as to the right of persons not parties to covenants and agreements of this character to enforce them have arisen under various conditions. In some cases there has been a general plan or scheme, where each party has bought with reference to the general plan and the agreement entered into the purchase of each piece of property, and in such cases the agreement has been enforced between grantees. Where land is sold in lots or parcels and agreements are made with each purchaser creating a building line, the inference is that the agreements are intended for the common benefit of all the purchasers. That intention is manifested by the character of the transaction, and each may enforce the restrictive agreement against the others. There was nothing of that kind in this case. Another class of cases is where the vendor has sold a part of his lands and imposed a restriction upon the lands retained in favor of the lands sold. *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206, is a case of that kind, where a party purchased a lot for a residence site with an agreement of the vendors that any further conveyances of lots on the same street would provide that purchasers should not erect houses within twelve feet of the line of the street. They subsequently conveyed to another party a lot containing the restriction. The second grantee had notice of the agreement lawfully made with the first purchaser, and was not permitted to use the property in a manner inconsistent with the agreement. There was no element of that kind in this case. When King sold or gave the lot to complainant there was no agreement with her upon which she could base any right to enforce the restriction subsequently made in the

conveyance to the First Methodist Episcopal Church. King not only parted with the title to the lot of complainant and had no interest in it, but there was neither agreement nor understanding that he would impose any restriction thereafter for its benefit. Another class of cases is where the owner sells a part of his premises and imposes a restriction on the purchaser by which the lands retained will be benefited. Such a transaction is sufficient to show an intention that the restriction is for the benefit of the lands retained, and the grantor, or his subsequent grantee, can enforce it. *Star Brewery Co.* v. *Primas*, 163 Ill. 652, is an example of a grant with a restrictive clause as to the use of the property granted, for the benefit of property retained by the grantor. The premises sold were not to be used for saloon or dram-shop purposes so long as the grantor owned a saloon building near by. This case does not come under the rule in those cases. The deed from King did not, in terms, express an intention or purpose to benefit complainant's lot or to impose a restriction in favor of such lot, and the only reference to it is as a monument. The mere fact that he mentioned it in that way is not sufficient to show that he designed to protect the light, air or view or to give an interest in the property. If he had desired to do so it would have been very easy to express his purpose, as was done in the deed construed in *Tinker* v. *Forbes*, 136 Ill. 221. In that case the provision was that no building should be erected on the half lot conveyed, that should darken any light, within three feet of the west line of said half lot. By that provision the intention of the grantor was manifested and notice given of such intention. In *Gilbert* v. *Peteler*, 38 Barb. 488, the grantee agreed not to erect any structure or building whereby the view or the prospect of the bay from a certain dwelling house should be obstructed or impaired. In these cases the restriction was for the benefit of particular property, as appeared from the terms of the agreement, and could be enforced by the owners

of such property. Outside of the language of the deed there is nothing in the circumstances which could have any possible relation to complainant or her property, except the fact that she was the daughter of King. If the First Methodist Episcopal Church was aware of that fact, (which does not appear,) and the intention of the parties is to be ascertained by construing the terms of the deed in connection with that fact, we do not think that such relationship would be sufficient to sustain complainant's claim. The alleged intention and understanding that the restriction was in favor of complainant's property was not expressed in any manner, and the mere fact of parental regard would not give the words of the deed the meaning insisted upon. If such regard, alone, without any agreement or obligation, would have that effect, then a more distant relationship might be resorted to for the same purpose, or mere friendship be considered as adding to the terms of the deed.

We think it does not appear from the terms of the deed, when construed according to the established rules of law, that the restriction was for the benefit of complainant's lot. It follows that the learned chancellor of the superior court was right in dismissing the bill.

The decree is affirmed.

Decree affirmed.

INDEX.

ABSTRACT OF RECORD. PAGE.

evidence should be condensed in narrative form in abstract so as to concisely present its substance..... 15

evidence should not be copied at length in brief and argument, but reference should be made to the abstract..... 15

ACKNOWLEDGMENT.

when acknowledgment of chattel mortgage is valid..... 444

to create lien on homestead estate of the mortgagee the certificate of acknowledgment must show that the estate was waived and relinquished..... 554

acknowledgment of mortgage to corporation, taken by a stockholder, is void..... 554

effect of recording mortgage having a void certificate of acknowledgment..... 554

ACTIONS AND DEFENSES.—See RIGHTS AND REMEDIES.

partition of estate among life tenants without making remainder-men parties does not bind latter..... 40

when statute begins to run against remainder-men whose interests are in separate tracts allotted to the several life tenants by partition among them..... 40

city is not liable for rent of ground occupied as a camp by State militia sent to suppress a riot, nor for damages done by them to the grounds..... 55

plaintiff's contributory negligence no defense to action for willful violation of Mines act..... 156

there can be no *laches* where there is no knowledge..... 206

when *laches* in discovering fraud will not be imputed..... 206

breach of an oral contract within the Statute of Frauds cannot be set up as a defense, by way of recoupment, to suit on promissory note..... 295

facts under which Statute of Limitations will be applied.. 304

what does not suspend running of Statute of Limitations. 304

judgment in *certiorari* proceeding affecting drainage district is not a bar to *quo warranto* proceeding to test the legality of its organization..... 311

Attorney General may file information against drainage district regardless of lapse of time since organization... 311

ACTIONS AND DEFENSES.—*Continued.* PAGE.
right of defendant in suit on replevin bond to set up title to the property in himself..... 445
former dedication of property condemned for widening a street cannot be set up in an assessment proceeding to pay the judgment 490
insane person of means is liable to the county for his support at the county asylum..... 537
intention of county officials to charge for support of insane person at county ayslum does not enter into the case.... 537
what necessary to authorize recovery from a municipality of taxes illegally collected and paid over..... 542
payment of taxes to prevent sale is not "under compulsion" 542
effect of voluntary payment of illegal tax..... 542
landlord is liable in damages for failure to disclose to tenant the fact of presence of sewer gas in the premises... 569
when new promise to pay a barred debt sufficiently identifies the indebtedness..... 599
a new promise is not to be construed as applying only to such portion of debt as is not barred..... 599
a new promise is sufficient although amount to be paid is not specified, where such amount is a matter of computation, which has not been made..... 599

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.

AFFIDAVITS.
counter-affidavits may be filed upon a motion to set aside default and vacate judgment..... 277
when an affidavit to extend chattel mortgage must be regarded as filed in time..... 444

AGENCY.—See PRINCIPAL AND AGENT.
party affirming existence of agency has burden of proof .. 108
when purchaser of an assignment of judgment is bound to ascertain seller's authority as agent..... 108
mere fact that seller of assignment of judgment in favor of minor assumes to act as guardian's agent does not establish the relation of agency 109

AMENDMENTS.
when amendment of creditor's bill does not introduce new cause of action..... 21
when amendment of declaration in action for negligence does not state a new cause of action..... 281
effect of plaintiff's failure to allege due care in original declaration—limitations..... 466
section 23 of Practice act, as to amendments, construed.. 466

APPEALS AND ERRORS. PAGE.
if only one complainant appeals from a decree the assignment of errors must be regarded as they affect him only, and if decree is right as to him it will be affirmed..... 91
decree entered on verdict of a jury upon issues of mental capacity and undue influence will not be disturbed, on appeal, unless findings are against the evidence..... 119
provision of section 90 of Practice act, making Appellate Court's findings of fact conclusive upon Supreme Court, does not apply to chancery cases 136
proceeding to enforce a claim in county court against estate of deceased partner is in the nature of a chancery proceeding, and Supreme Court may review facts..... 136
when freehold is involved on appeal from decree enjoining collection of judgment against complainant for obstructing alleged public highway 154
when failure of instructions to limit amount of recovery to the *ad damnum* is harmless..... 156
a clerk has no power to approve an appeal bond unless authorized by an order of the court..... 162
if the only appeal bond filed within the time allowed is approved by the clerk without authority, the defect can not be remedied by filing a new bond..... 162
party specifying grounds for new trial is confined, on appeal, to the reasons specified..... 164
practice of singling out name of witness in an instruction relating to credibility is disapproved..... 164
when refusal to sustain challenge for cause is harmless... 164
when instruction as to effect of possession of stolen property is not erroneous..... 173
one cannot complain of error not affecting his interest.... 189
decree must be reversed if no evidence to sustain it is preserved either by certificate or by recital in decree..... 193
a party cannot complain of the refusal of an instruction stating an abstract rule of law. 197
language of instruction construed as not misleading..... 203
when denial of motion to exclude evidence is proper..... 203
when conviction will not be reversed as against evidence or for improper conduct of prosecuting attorney..... 211
when freehold is involved in attachment suit..... 244
when Appellate Court's decision is final..... 258
a franchise is not involved in a suit to set aside or redeem from a conveyance of letters patent..... 266
when refusal to set aside default will be upheld..... 277
case must relate directly to the revenue in order to give Supreme Court jurisdiction upon that ground..... 292
when Supreme Court cannot entertain appeal..... 292

APPEALS AND ERRORS.—*Continued.* PAGE.
when instruction is properly refused—when objection to instruction is not well taken..... 298
proposition calling for court's opinion upon a question of fact is properly refused..... 304
when it is error to sustain demurrer to replication to plea in *quo warranto* proceeding..... 311
when bill of exceptions must be presented in order to preserve question for review..... 370
when matters are not properly preserved by bill of exceptions and may be expunged upon appeal..... 370
when instruction that master is under no greater obligations to look out for servant's safety than is the servant is properly refused..... 382
a freehold is not involved in a proceeding to cancel a certificate of sale as a cloud on title..... 394
when inaccuracy of instruction will not reverse..... 466
when errors of procedure will not reverse..... 497
same party cannot have more than one petition for a rehearing in the same cause..... 497
when instruction as to effect of changing street grade is not objectionable because it makes no reference to the effect of the entire improvement..... 518
instruction which invites the jury to speculate upon the possibility of permanent injury is erroneous where there is no evidence that such a result is probable..... 526
when objection that appeal was improperly allowed comes too late..... 606

ASSESSMENT FOR TAXATION.—See TAXES.

ASSIGNMENTS.
when purchaser of assignment of judgment is bound to ascertain seller's authority as agent..... 108
mere fact that seller of assignment of minor's judgment assumes to act as agent of guardian in making sale does not prove his agency..... 109
filing assignment of judgment with clerk of court for record is not notice to any one..... 109
assignment of judgment transfers only an equitable title. 109
when admissions by agent are not inadmissible upon the ground that they tend to contradict terms of written assignment of stock to him by principal..... 133

ASSUMED RISKS.—See MASTER AND SERVANT.
servant does not assume the increased hazard due to the master's own negligence..... 15

ATTACHMENT. PAGE.
when freehold is involved in attachment suit..... 244
if property actually belongs to the wife, neither it nor the legitimate outgrowth of the investment can be taken for the husband's debts..... 244
products of a wife's farm are not liable for husband's debts merely because he works on the farm..... 244
fact that husband lives with the family on wife's farm and does work on the place does not enable his creditors to seize it for his debts..... 244

ATTESTATION.
when attestation of will is in testator's presence..... 484

ATTORNEYS AT LAW.
contempt proceedings and disbarment proceedings are distinct and should not be combined..... 250
suspension of attorney for contempt of court is not conclusive in subsequent proceeding for disbarment..... 250

BALLOTS.
section 12 of Ballot act of 1891 is the only provision of the act concerning the use of pasters..... 99
how to vote for candidate whose name is not on ticket.... 99
ballots prepared by voters by pasting a slip of paper having a name printed on, over the name of another candidate, are invalid and cannot be counted for any one..... 99

BANKS.
when surrender of certificate of deposit does not release estate of deceased member of banking firm from liability upon subsequent failure of bank..... 136
parties engaging in banking business may provide for continuation of business by surviving partners..... 136

BARRED DEBTS.—See LIMITATIONS.

BILLS AND NOTES.
breach of an oral contract within the Statute of Frauds cannot be set up as a defense by way of recoupment to suit on promissory note..... 295

BILLS OF EXCEPTIONS.
when bill of exceptions must be presented..... 370
when questions are not preserved by continuance of motion for new trial, so as to permit them to be saved by bill of exceptions at subsequent term..... 370
when motion to expunge matters from bill of exceptions must be allowed on appeal..... 370

BOARD OF TRADE. PAGE.
purpose of act of 1897 against bucket-shops is to prevent gambling in grain or other commodities 396
party conducting grain broker's business must know that his customers are buying in good faith 396
what proof establishes keeping of bucket-shop 396
enforcement of rule of board of trade prohibiting members from executing orders for customers without a *bona fide* sale and delivery should not be enjoined 397

BOARDS OF REVIEW.
if the assignor of notes and mortgages refuses to disclose names of assignees to board of review, the latter has no power to assess them to the assignor 623

BONDS.
a clerk has no power to approve an appeal bond unless authorized by an order of the court 162
if the only appeal bond filed within the time allowed is approved by the clerk without authority, the defect can not be cured by filing a new bond 162

BREACH OF CONTRACT.—See CONTRACTS.

BRIEFS.
evidence should not be copied at length in the brief and argument, but reference should be made to the abstract. 15

BUCKET-SHOPS.
when decision whether complainant keeps a bucket-shop is necessary to a decision of suit to enjoin defendant from refusing to furnish market reports 396
purpose of act of 1897, against bucket-shops, is to prevent gambling in grain or other commodities 396
party conducting grain broker's business must know that his customers are buying in good faith 396
what proof establishes keeping of bucket-shop 396
what does not establish a *bona fide* intention to avoid violation of law against bucket-shops 397
enforcement of rule of board of trade prohibiting members from executing orders for customers without a *bona fide* sale and delivery should not be enjoined 397

BUILDING LINES.
when plat sufficiently establishes building line 575
term "building line" is not of doubtful meaning 575
reservation of building line creates an easement, and it is not necessary that the plat mention or set forth the persons to be benefited by the reservation 575

BUILDING LINES.—*Continued.* PAGE.
if deed refers to plat containing building restrictions, the grantee is not relieved therefrom because they are not mentioned in his deed 575
when fact that other parties have not observed building restrictions is immaterial 575
acceptance of dedication of boulevard shown on plat is an acceptance of an appurtenant building restriction 575
grantor may convey subject to such building restrictions as he sees fit, and if the grantee accepts the deed the restrictions may be enforced by one having the right 633
party must show right to enforce building restriction 633
when building restriction contained in deed will not be enforced at suit of grantor's daughter 633

BUILDING SOCIETIES.—See LOAN ASSOCIATIONS.

BURDEN OF PROOF.
party affirming existence of relation of agency between third parties has the burden of proof 108
when defendant has the burden of proving allegations of plea in replevin 164

BURGLARY.
when burglar's tools found upon person of accused may be put in evidence on trial for burglary 173
when instruction upon effect of possession of stolen property is not erroneous 173

CARRIERS.—See RAILROADS.
street cars should approach street crossings under control. 298
what evidence competent as tending to show intent of deceased to become passenger on train 480

CASES CONTROLLED BY OTHERS.—See FORMER CASES.
City of Chicago v. *Sherman*, 192 Ill. 576, controls the decision of *City of Chicago* v. *Holden* 153
Craig v. *People ex rel.* 193 Ill. 199, controls the decision of *Kingman* v. *People ex rel.* 192
Vance v. *Rankin*, 194 Ill. 625, controls the decision in *People ex rel.* v. *Village of Franklin Park* 276

CERTIORARI.
if *certiorari* proceeding is set up as a bar to *quo warranto*, the petitioner may reply that the record in the *certiorari* proceeding is not a true one 311
judgment in *certiorari* proceeding affecting a drainage district is not a bar to *quo warranto* proceeding to test the legality of its organization 311

CITIES.—See MUNICIPAL CORPORATIONS.

CIVIL SERVICE. PAGE.
when an indictment sufficiently charges a violation of the County Civil Service act of 1895 454
County Civil Service act of 1895 does not embrace a subject not expressed in its title 454
County Civil Service act does not violate provision of constitution concerning the management of affairs in Cook county by board of commissioners 454
County Civil Service act does not confer a franchise upon president of county board 454
admissibility of certificate of eligibility bearing stamped signatures of civil service commissioners 454
when commissioner cannot say that issuing of illegal certificate of eligibility is not his act 455

CHANCERY.—See EQUITY; PRACTICE.

CLERKS OF COURT.
clerk has no power to approve an appeal bond unless authorized by an order of the court 162

CLOUD ON TITLE.
proof of possession by complainant is material if alleged in the bill 193
essentials of decree canceling tax deed as a cloud 193

COLLATERAL ATTACK.
if court had jurisdiction of condemnation suit the validity of its judgment cannot be attacked in a special assessment proceeding to pay the judgment 490

COMMERCIAL PAPER.—See BILLS AND NOTES.

COMMON LAW MARRIAGE.—See MARRIAGE.

CONDEMNATION.—See EMINENT DOMAIN.

CONSIDERATION.
a marriage is sufficient consideration for a trust deed settling life estate on wife with remainder to her children. 71

CONSTITUTIONAL LAW.
two per cent tax on premiums received by foreign insurance companies is not a commutation of a State tax, but is, of itself, a State tax 329
under sections 9 and 10 of article 9 of constitution, legislature must require that all taxable property within municipal corporations shall be taxed for their debts 329

CONSTITUTIONAL LAW.—*Continued.* PAGE.
section 1 of article 9 of constitution construed..... 329
legislature cannot release property from municipal taxes. 329
two per cent tax act of 1899 is unconstitutional, in that it releases foreign insurance companies from payment of municipal taxes 329
the act of 1895, providing for assessing stock of loan association to the stockholders and the real estate to the association, is valid 388
County Civil Service act of 1895 does not embrace subject not expressed in its title..... 454
County Civil Service act does not violate provisions of constitution relating to the management of affairs in Cook county by the county commissioners..... 454
County Civil Service act does not confer a franchise upon the president of the county board..... 454
constitution does not require that the number of the section of act to be amended be specified..... 542
mistake in number of section to be amended does not invalidate amendatory act if there is no uncertainty as to the subject of the amendment..... 542
amendment of School law by the act of April 21, 1899, not invalid..... 542

CONSTRUCTION.
of will, as passing an estate for life with remainder in fee, under section 6 of the Conveyance act, which abolishes estates tail in Illinois..... 40
word "absolute," though used in a will in describing an interest in property, may be given a more restricted meaning than the word "unqualified"..... 83
language of will construed as not devising fee of right of way to testator's son, but as giving him an easement of passage as it was used during testator's life..... 83
of language of instruction, as not misleading..... 203
a contract by a theatrical performer to render "satisfactory services" means satisfactory to the employer..... 221
the intention to be sought for in construing a will is not that which existed in the mind of the testator, but that which is expressed in the will..... 230
of section 15*a* of Farm Drainage act, as applying to elections in drainage districts lying in two towns..... 310
County Civil Service act of 1895 construed as not being unconstitutional..... 454
of section 23 of Practice act, concerning amendments.... 466
of sidewalk ordinance, as not being uncertain..... 512
an ordinance must be viewed as a whole, and one part or section may be referred to to explain another..... 512

CONTEMPT. PAGE.
contempt proceedings and disbarment proceedings are distinct and should not be combined..... 250
suspension of an attorney for contempt of court is not *res judicata* in subsequent disbarment proceeding..... 250

CONTINGENT REMAINDERS.—See WILLS.

CONTRACTS.
life tenant cannot bind remainder-man by a lease in which he agrees, at termination of lease, to buy the buildings erected upon the property by the lessee..... 71
if facts are admitted in suit for terminating contract of employment, the court should instruct the jury whether such facts are a justification for plaintiff's discharge... 221
a contract by a theatrical performer to render "satisfactory services" means satisfactory to the employer..... 221
agreement by corporation to buy its own stock cannot be enforced to injury of creditors..... 236
as against creditors, private arrangements between corporation and subscribers to stock whereby the latter seek to avoid legal liability are ineffectual..... 236
when a bill of sale is improperly admitted in evidence in suit on replevin bond..... 269
a purchaser to whom the seller has delivered possession of the personal property is protected against a subsequent attempt to transfer title by bill of sale..... 269
breach of an oral contract within the Statute of Frauds cannot be set up as a defense by way of recoupment to suit on promissory note..... 295
when amount agreed to be paid in case of breach of contract is not controlling as to the amount of damages to be recovered..... 365
case for breach of contract must go to the jury if the evidence shows breach of legal contract..... 365
city has power to acquire land for bridge purposes..... 580
right of city to contract for easement of right to swing a bridge over land and to agree to construct a vault under sidewalk for land owner to use for boiler room..... 580
if lawful contract is irregularly made by city officers the city may ratify it by its acts and be estopped to deny its validity..... 580
when expense of contract for work may properly be paid from appropriation to build a bridge..... 580
whether city ratified contract is a question of fact..... 581

CONTRIBUTORY NEGLIGENCE.—See NEGLIGENCE.

CONVEYANCES.—See DEEDS; MORTGAGES. PAGE.
voluntary conveyance from husband to wife merely to put title in her name is void as to creditors..... 20
to render voluntary conveyance void as to creditors it is not necessary that grantor be actually insolvent..... 20
effect where the grantor in alleged fraudulent conveyance swears he had no fraudulent intent..... 20
when interests of heirs pass by deed..... 40
facts under which a party is entitled to have conveyances set aside in equity upon ground of fraud..... 206

CORPORATIONS.—See MUNICIPAL CORPORATIONS; RAILROADS.
if stock has no ascertainable market value, evidence of the value of corporation's property over its indebtedness is competent, as tending to fix value of stock..... 133
agreement by corporation to buy its own stock cannot be enforced to injury of creditors..... 236
capital stock is a trust fund for payment of debts and subscribers of stock are charged with notice of such fact... 236
as against creditors, private arrangements between corporation and subscribers to stock whereby the latter seek to avoid legal liability are ineffectual..... 236
if the execution of an instrument for a corporation is not denied by a verified plea, the authority of the agent to execute it need not be proved..... 260
two per cent tax on premiums received by foreign insurance companies is both a license fee and a State tax superseding other personal property taxes..... 329
two per cent tax act of 1899 is unconstitutional, in that it releases foreign insurance companies from payment of municipal or local taxes..... 329
the act of 1895, providing for assessing stock of loan association to the stockholders and the real estate to the association, is valid..... 388
acknowledgment of mortgage to corporation taken by a stockholder is void, but an officer not a stockholder is not disqualified to take the acknowledgment..... 554
electric light company must treat its customers without unjust discrimination..... 626
when refusal of an electric light company to furnish free transformer is unjust discrimination..... 626

COSTS.
when defendants to partition should not pay any costs.... 71
confirmation judgment entered after act of 1901 took effect should not include the cost of making the assessment... 512

COUNTIES.—See CIVIL SERVICE. PAGE.
county court has jurisdiction of a suit in assumpsit by the county to recover for support of an insane person when damages are laid at $1000 537
insane person of means is liable to the county for his support in the county asylum 537
intention of county officials to charge for support of insane person at county asylum does not enter into the case.... 537

COURTS.—See APPEALS AND ERRORS; EQUITY.
right of probate court to order sale, by guardian, of judgment in favor of ward 108
provision of section 90 of Practice act making Appellate Court's findings of fact conclusive upon Supreme Court does not apply to chancery cases 136
proceeding to enforce claim in county court against estate of deceased partner is in nature of a chancery proceeding, and Supreme Court may review facts on appeal.... 136
when Appellate Court's decision is final..... 258
whether an act is within the police power is a question for the courts to determine..... 497
county court has jurisdiction of assumpsit by a county to recover for support of insane person where the damages are laid at $1000..... 537

CREDITORS' BILLS.—See DEBTOR AND CREDITOR.
when amendment of creditor's bill does not introduce new cause of action..... 21

CRIMINAL LAW.
when burglar's tools found upon person of accused may be put in evidence on trial for burglary 173
Habitual Criminal act of 1883 is not repealed..... 173
when conviction under Habitual Criminal act is proper... 173
when instruction as to effect of possession of stolen property is not erroneous..... 173
conviction for robbery may be sustained though proof of character and denominations of money stolen is not as strict as is required in case of larceny..... 211
when conviction will not be reversed as against evidence or for improper conduct of prosecuting attorney..... 211

DAMAGES.
when amount agreed to be paid in case of breach of a contract does not control amount of damages..... 365
when condemnation verdict will be upheld..... 370
benefits and damages attending original purchase of right of way cannot be litigated in subsequent proceeding to condemn additional land for tracks..... 371

DAMAGES.—*Continued.* PAGE.
right of jury in condemnation to base compensation upon their own view of the premises 371
evidence of a miscarriage may be shown under general allegations of damages 466
law presumes pecuniary loss to father from death of son.. 480
interference with access to property by changing grade of street is a damage for public use, within the meaning of the constitution..... 496
city is liable for damages from changing grade of street, whether change is made by city or some corporation in obedience to track elevation ordinance.. .....519, 496
diversion of traffic is not an element of damage in a suit against city for damage to property from changing the grade of street..... 496
what evidence improper in suit against city for damages from changing grade of street..... 497
what evidence competent in action against city for damages from changing grade of street..... 518
plaintiff may show that tenants moved out because grade of street was changed and that she had put the property in good repair..... 518
both damages and benefits to property from a street improvement must be real and substantial..... 519
instruction which invites the jury to speculate upon the possibility of permanent injury is erroneous, where there is no evidence that such a result is probable..... 526
landlord is liable in damages for failure to disclose to tenant the fact of presence of sewer gas upon premises.... 569

DEBTOR AND CREDITOR.
voluntary conveyance from husband to wife merely to put title in her name is void as to creditors 20
to render a voluntary conveyance void as to creditors it is not necessary that grantor be actually insolvent..... 20
where rights of creditors are involved, circumstances must show that wife recognized the alleged agency of her husband in investing her funds..... 20
that wife permitted husband to hold himself out as owner is a material circumstance where controversy is between the husband and his creditors..... 20
what amounts to a consent by wife to husband's obtaining credit upon his apparent ownership of property..... 20
when wife's funds are liable for husband's debts..... 20
effect where grantor in an alleged fraudulent conveyance swears he had no fraudulent intent..... 20
if trustee mingles trust funds with his own, so that they cannot be separated, the beneficial owner occupies the position of a general creditor..... 21

DEBTOR AND CREDITOR.—*Continued.* PAGE.
when surrender of a certificate of deposit does not release estate of deceased partner from liability upon the subsequent failure of the banking firm..... 136
rights of creditor against estate of deceased partner..... 136
mere fact that creditor takes separate liability of surviving partners does not release estate of deceased partner. 136
general policy of the law concerning administration..... 179
when superior diligence by creditor confers no advantage. 179
duties and powers of ancillary administration..... 179
when distribution of assets in different States is proper... 179
agreement by corporation to buy its own stock cannot be enforced to injury of creditors..... 236
capital stock is a trust fund for payment of debts..... 236
as against creditors, private arrangements between corporation and subscribers to stock whereby the latter seek to avoid legal liability are ineffectual..... 236
if property actually belongs to the wife the increase of the investment is hers and is not liable for husband's debts.. 244
products of wife's farm, nor the farm itself, are not liable for husband's debts because he lives with his family on the farm and works on it..... 244
when new promise sufficiently identifies debt..... 599
a new promise is not to be construed as applying only to portion of debt not barred by the statute..... 599
a new promise is sufficient although amount to be paid is not specified, where such amount is a matter of computation, which has not been made..... 599
when new promise is not made to a stranger..... 599

DEDICATION.
acceptance of dedication of boulevard shown on plat is an acceptance of an appurtenant building restriction..... 575

DEEDS.—See CONVEYANCES.
the law presumes more in favor of delivery in voluntary settlements than in cases of bargain and sale..... 71
marriage is a sufficient consideration for a trust deed settling life estate on wife, and if the title passes for wife's benefit it passes for all purposes of the deed..... 71
if first taker under a deed creating an estate tail at common law refuses to accept the deed no estate vests as to the remainder..... 119
the law does not presume that purchase by brother from sister was fraudulent because of their relationship..... 127
when deed will not be set aside in equity because of alleged breach of fiduciary relation between grantor and grantee. 127
when building restriction contained in a deed will not be enforced at suit of grantor's daughter..... 633

DEFAULT. PAGE.
when refusal to set aside default will be upheld..... 277
counter-affidavits may be filed on a motion to set aside default and vacate judgment..... 277

DELIVERY.—See DEEDS.

DEMURRER.
when bill is bad for uncertainty..... 65

DISBARMENT.
contempt proceedings and disbarment proceedings are distinct and should not be combined..... 250
suspension of attorney for contempt is not *res judicata* in subsequent proceeding for disbarment..... 250

DISTRACTED PERSONS.—See LUNATICS.

DRAINAGE.
section 15*a* of Farm Drainage act applies to elections held in drainage districts lying in two towns..... 310
what not essential to a plea in *quo warranto* setting up respondents' election as drainage commissioners..... 310
when plea to information in *quo warranto* need not set forth the organization of drainage district..... 310
jurisdictional facts relating to organization of drainage district may be inquired into in *quo warranto*, and if alleged in plea may be denied by replication..... 311
judgment in a *certiorari* proceeding affecting drainage district is not a bar to a *quo warranto* proceeding to test the legality of its organization 311
Attorney General may file information against a drainage district regardless of lapse of time since organization... 311

EASEMENTS.
language of will construed as not devising fee of right of way to testator's son, but as giving him an easement of passage as it was used during testator's lifetime..... 83
when donee of an easement of right of way must open and close gate when passing through, and has no right to remove it or break it down..... 83
reservation of building line creates an easement, and it is not necessary that the plat mention or set forth the persons to be benefited by the reservation 575

ELECTION.
party electing to accept a provision of will for her benefit adopts the will in all its provisions. 91

ELECTIONS. PAGE.
section 12 of Ballot act of 1891 is the only provision of the act concerning the use of pasters..... 99
how to vote for candidate whose name is not on ticket.... 99
ballots prepared by voters by pasting a slip of paper having a name printed on, over the name of another candidate, are invalid and cannot be counted for any one 99
if the law prescribes both the time and the place for holding an election, every voter is presumed to take notice of the law..... 310
section 15a of Farm Drainage act applies to elections held in drainage districts lying in two towns..... 310
what not essential to plea in *quo warranto* setting up respondents' election as drainage commissioners..... 310
when mistake in date in plea in *quo warranto* referring to notices of election may be rejected as surplusage.... .. 310

ELECTRIC CARS.—See STREET RAILWAYS.

ELECTRIC LIGHT COMPANIES.
electric light company must treat its customers without unjust discrimination. 626
when refusal of an electric light company to furnish free transformer is unjust discrimination 626

EMINENT DOMAIN.
when condemnation verdict will be upheld..... 370
right of jury in condemnation to base compensation upon their own view of the premises..... 371
benefits and damages attending original purchase of right of way cannot be litigated in subsequent proceeding to condemn additional land for tracks..... 371
if court had jurisdiction in condemnation proceeding, the validity of its judgment cannot be attacked in a special assessment proceeding to pay judgment..... 490
effect upon special assessment proceeding where condemnation judgment is against part, only, of land described in the ordinance..... 490
a former dedication of property condemned for widening street cannot be set up in a special assessment proceeding to pay the judgment..... 490

EQUITY.
when bill is bad for uncertainty..... 65
when defendants to partition should not pay any costs.... 71
fiduciary relation does not necessarily arise from fact that parties are brother and sister and tenants in common... 127

EQUITY.—*Continued.* PAGE.
when deed will not be set aside in equity upon the ground of an alleged abuse of a fiduciary relation between the grantor and grantee..... 127
proceeding to enforce claim in county court against estate of deceased partner is in the nature of a chancery proceeding, and Supreme Court may review facts on appeal. 136
decree must be reversed if no evidence to sustain it is preserved, either by certificate or by recital in decree..... 193
proof of allegation of possession by complainant is essential in a proceeding to remove cloud from title..... 193
essentials of decree canceling tax deed as a cloud. 193
material averment of bill in chancery not denied or admitted must be supported by proof..... 193
there can be no *laches* where there is no knowledge..... 206
when *laches* in discovering fraud will not be imputed..... 206
facts under which party is entitled to have conveyances set aside in equity upon ground of fraud..... 206
equity has no power to reform a will..... 230
the fact that the testamentary beneficiary has no equity as against the heir is one reason why equity will not undertake to reform a will..... 230
a court of equity has jurisdiction to enjoin the collection of a tax not authorized by law and wholly illegal and void. 388
a tax upon the property of a loan association, levied under an assessment not made in accordance with the requirements of the acts of 1895, is void..... 388
when collection of tax will be enjoined..... 623

ESTATES TAIL.
estates tail abolished in Illinois by section 6 of the Conveyance act, which changes them to an estate for life with remainder in fee..... 40
will construed as passing, under section 6 of the Conveyance act, an estate for life with remainder in fee..... 40
if first taker under a deed creating an estate tail at common law refuses to accept the deed no estate vests as to the remainder. 119

ESTOPPEL.
party electing to accept provision of will for her benefit is estopped to deny validity of other provisions of will.. 91
a mortgagee alleging the legal effect of the mortgage is bound by her construction thereof..... 164
when a property owner is estopped to deny validity of the description of his property for taxation..... 353
when a civil service commissioner cannot say that illegal certificate of eligibility is not his act..... 455

EVIDENCE. PAGE.
facts under which court should not direct verdict for the defendant in action by car repairer for injuries..... 15
when rights of creditors are involved, circumstances must show that wife recognized alleged agency of her husband in investing her funds..... 20
that wife permitted husband to hold himself out as owner is a material circumstance, where the controversy is between the husband and his creditors..... 20
what amounts to consent by wife to husband's obtaining credit upon his apparent ownership of property..... 20
effect where grantor in an alleged fraudulent conveyance swears that he had no fraudulent intent..... 20
declarations of deceased parents are competent to establish parentage of children..... 71
what must be shown by trust company to whom a trustee has fraudulently transferred, as collateral security, a note and trust deed to which he had no title..... 96
facts under which the purchaser of note and trust deed is charged with notice that seller is not the legal holder... 96
party affirming existence of relation of agency between third parties has the burden of proof..... 108
mere fact that seller of assignment of a minor's judgment assumes to act as agent for guardian does not prove the fact of his agency..... 109
the law does not presume that purchase by brother from sister was fraudulent because of their relationship..... 127
when admissions by agent are not inadmissible upon the ground that they tend to contradict written assignment of stock to him by principal..... 133
what proper proof as to value of stocks..... 133
what evidence sufficient to go to the jury upon question whether place where a miner was injured was an exit to the escapement shaft..... 156
when defendant has the burden of proving allegations of plea in replevin..... 164
rule as to discrediting testimony..... 164
when burglar's tools found upon person of accused may be put in evidence on trial for burglary..... 173
when conviction under Habitual Criminal act is proper... 173
proof of allegation of possession by complainant in bill to remove tax deed as a cloud is essential..... 193
material allegation of a bill in chancery neither admitted nor denied must be supported by proof..... 193
when city is liable for bridge-tender's negligence..... 197
when denial of motion to exclude evidence is proper..... 203
conviction for robbery may be sustained though proof of character and denominations of money stolen is not as strict as is required in case of larceny..... 211

EVIDENCE.—*Continued.* PAGE.
when general ordinance fixing width of sidewalks is admissible to show width of roadways 215
in a special assessment proceeding the Supreme Court must accept the evidence in the record as to benefits 215
what essential to establish way by prescription 226
owner of fee may testify as to his intention in permitting use of way 226
parol evidence is not admissible to clear up or explain an ambiguity appearing upon the face of a will 230
when authority of agent to execute instrument for corporation need not be proved 260
failure of city to deny execution of lease by verified plea is an admission of its execution 260
section 33 of Practice act, providing that no "person" shall deny execution of written instrument except by verified plea, includes municipal corporations 260
when lease is admissible in evidence against city without proof of regularity of steps taken by the city authorities in the matter of its execution 260
plaintiff not required, in every suit against a city, to show that city is not indebted beyond constitutional limit 260
when proposed method of proving ownership of property is not proper 260
when bill of sale is improperly admitted in evidence in a suit on replevin bond 269
a party to whom receipts for rent are given may explain, by oral testimony, why they run in the name of another. 274
admissibility of proof of condition of defective sidewalk at places other than where accident occurred 288
when evidence of subsequent repairs is admissible 288
evidence that other persons had stumbled over the same stake in sidewalk is admissible, as tending to show the common cause of the accidents was dangerous 288
facts under which Statute of Limitations will be applied .. 304
what does not suspend running of Statute of Limitations. 304
what sufficient to warrant submission of case to a jury in action by servant for personal injuries 345
question what is "practicing medicine," within the meaning of the statute, is not one for expert testimony 361
party recommending and selling mechanical device for relieving pain is not practicing medicine 361
what must be shown to sustain conviction under section 8 of Medicine and Surgery act of 1899 361
right of jury in condemnation to base compensation upon their own view of the premises 371
facts under which the question of assumed risk must be decided by the jury 382

EVIDENCE.—*Continued.* PAGE.
benefits and damages attending original purchase of right of way cannot be litigated in subsequent proceeding to condemn additional land for tracks ... 371
what proof establishes keeping of bucket-shop ... 396
facts which do not establish a *bona fide* intention to avoid violation of Bucket-shop act ... 397
what not relevant in bucket-shop case ... 397
effect where party refuses to answer a relevant question upon the ground of privilege ... 397
what sufficient to go to jury upon question of a street car company's negligence in injuring child ... 410
alleged admissions of young child as to manner of receiving injury should be received with great caution ... 410
if relation of marriage has actually been created, subsequent admissions of the wife to the contrary have no effect to dissolve the marriage tie ... 432
evidence reviewed and held to establish all the elements of a common law marriage ... 432
admissibility of document bearing stamped signature ... 454
evidence of a miscarriage may be shown under a general allegation of damages ... 466
when party is not an innocent purchaser as against holder of trust deed ... 472
what evidence competent as tending to show intent of the deceased to become passenger on train ... 472
law presumes pecuniary loss to father from death of son ... 472
when attestation of will is in testator's presence ... 484
beneficiaries under will are not competent to testify in its favor against heirs-at-law ... 484
proponent is not limited to subscribing witnesses, in circuit court, upon subject of testamentary capacity ... 484
diversion of traffic is not an element of damage in a suit against city for damage to property from changing the grade of street ... 496
what evidence improper in suit against city for damages from changing grade of street ... 497
what competent in action against city for damages from changing grade of street ... 518
plaintiff may show that tenants moved out because grade of street was changed and that the property had been in good repair ... 518
both damages and benefits to property from a street improvement must be real and substantial ... 519
when evidence that other persons have not observed building restrictions is immaterial ... 575
what tends to show negligence in placing props in mine ... 594
facts under which relation of fellow-servants exists ... 612

EXECUTORS AND ADMINISTRATORS. PAGE.
general policy of the law concerning administration..... 179
when superior diligence by creditor confers no advantage. 179
administration in domicil of deceased is principal one.... 179
duties and powers of ancillary administration..... 179
when distribution of assets in different States is proper... 179

EXPERT TESTIMONY.
question what is "practicing medicine," within the meaning of the statute, is not one for expert testimony..... 361

FELLOW-SERVANTS.
relation of fellow-servants does not depend upon acquaintanceship of the parties nor the length of time they have worked together 612
when relation of fellow-servants exists..... 612

FIDUCIARY RELATIONS.
fiduciary relation does not necessarily arise from the fact that parties are brother and sister and co-tenants 127
the law does not presume that purchase by brother from sister is fraudulent because of their relationship..... 127
when deed will not be set aside in equity upon the ground of an alleged abuse of a fiduciary relation between the grantor and grantee..... 127

FORECLOSURE.—See MORTGAGES.
when accrued rent cannot be applied on deficiency decree. 189

FOREIGN CORPORATIONS.—See CORPORATIONS.

FORMER CASES.
Vandersyde v. *People*, 195 Ill. 200, followed, as to what is not an arbitrary subdivision of land..... 146
Featherstone v. *People*, 194 Ill. 325, followed, as to Habitual Criminal act not having been repealed..... 173
Dement v. *Rokker*, 126 Ill. 174, distinguished, as to when lease is admissible against city without proof of regularity of steps taken by city authorities..... 260
In re St. Louis Loan and Investment Co. 194 Ill. 699, followed, as to validity of act of 1895 providing method of assessing property of loan association..... 388
Rack v. *Chicago City Railway Co.* 173 Ill. 289, distinguished, as to what evidence is sufficient to go to the jury in action against street car company for injuring child..... 410
Lasher v. *People*, 183 Ill. 226, distinguished, as to County Civil Service act not conferring a franchise upon president of county board..... 454

FORMER CASES.—*Continued.* PAGE.
People v. *Whidden*, 191 Ill. 374, explained, as to when improvement constructed is essentially different from the one authorized by the ordinance..... 603
Ohio and Mississippi Railway Co. v. *People*, 123 Ill. 468, followed, as to when assessment as for "omitted taxes" can not be sustained..... 606

FRANCHISE.
a franchise is not involved in a suit to set aside or redeem from a conveyance of letters patent..... 266
County Civil Service act does not confer a franchise upon president of the county board..... 454

FRAUD.
voluntary conveyance from husband to wife merely to put title in her name is void as to creditors. 20
effect where grantor in an alleged fraudulent conveyance swears he had no fraudulent intent..... 20
what must be shown by trust company to whom a trustee has fraudulently transferred, as collateral security, a note and trust deed to which he had no title..... 96
when a purchaser of a note and trust deed is charged with notice that seller is not the legal holder..... 96
the law does not presume that purchase by brother from sister was fraudulent because of their relationship..... 127
when *laches* in discovering fraud will not be imputed..... 206
facts under which party is entitled to have conveyances set aside upon the ground of fraud..... 206

FREEHOLD.
when freehold is involved on appeal from decree enjoining collection of judgment against complainant for obstructing an alleged public highway 154
when freehold is involved in attachment suit..... 244
a freehold is not involved in a proceeding to cancel a certificate of sale as a cloud on title..... 394

GAMBLING.
purpose of act of 1897, against bucket-shops, is to prevent gambling in grain or other commodities..... 396
party conducting grain broker's business must know that his customers are buying in good faith 396
what proof establishes keeping of bucket-shop 396

GUARDIAN AND WARD.
at common law a guardian had power to sell ward's personal property without an order of court..... 108
common law powers of guardian not inconsistent with our statutes still exist in Illinois..... 108

GUARDIAN AND WARD.—*Continued.* PAGE.
right of probate court to order sale, by guardian, of judgment rendered in favor of ward..... 108
if guardian makes out an assignment of his ward's judgment, which he delivers to a third party for safe keeping, a purchaser from the latter must prove his agency. 108
when purchaser of an assignment of judgment is bound to ascertain seller's authority as agent..... 108
mere fact that seller of assignment of minor's judgment assumes to act as guardian's agent in making sale does not prove fact of agency..... 109

HIGHWAYS.
language of will construed as not devising fee of right of way to testator's son, but as giving him an easement of passage as it was used during testator's lifetime..... 83
when donee of easement of right of way over land has no right to remove gate or break it down..... 83
what essential to establish way by prescription..... 226
way by prescription must be shown to have been used under a claim of right..... 226
owner of fee may testify as to his intention in permitting use of way..... 226

HOMESTEAD.
when admission in answer to foreclosure bill is not binding as an admission that the defendants had released their homestead estate..... 554
to create lien on homestead estate of mortgagor the certificate of acknowledgment must show that the estate was waived and relinquished..... 554
acknowledgment of mortgage to corporation taken by a stockholder is void..... 554

HUSBAND AND WIFE.
voluntary conveyance from husband to wife to place title in her is void as to judgment creditors..... 20
to render a voluntary conveyance void as to creditors it is not necessary that grantor be actually insolvent..... 20
where rights of creditors are involved, circumstances must show that wife recognized the alleged agency of her husband in investing her funds..... 20
wife's claims are more readily established as against her husband than where rights of his creditors are involved. 20
that the wife permitted the husband to hold himself out as owner is a material circumstance where the controversy is between the husband and his creditors..... 20
what amounts to consent by a wife to husband's obtaining credit upon his apparent ownership of property..... 20

HUSBAND AND WIFE.—*Continued.* PAGE.
when wife's funds are liable for husband's debts..... 20
effect where grantor in an alleged fraudulent conveyance swears he had no fraudulent intent..... 20
marriage is a sufficient consideration for a trust deed settling life estate on wife, and if title passes for benefit of wife it passes for all purposes of the deed..... 71
when widow has no lien for money loaned to husband..... 71
if property actually belongs to the wife the increase of the investment is hers and is not liable for husband's debts.. 244
products of wife's farm not liable for husband's debts because he works on the farm..... 244
fact that husband lives with family on wife's farm and does work on the place does not enable his creditors to seize it for his debts..... 244
if relation of marriage has actually been created, subsequent admissions of the wife to the contrary have no effect to dissolve the marriage tie..... 432
evidence reviewed and held to establish all the elements of a common law marriage..... 432

INDICTMENT.
when indictment sufficiently charges a violation of County Civil Service act..... 454

INFANTS.—See MINORS.

INJUNCTION.
a court of equity has jurisdiction to enjoin the collection of a tax not authorized by law and wholly illegal and void. 388
enforcement of rule of board of trade prohibiting members from executing orders for customers without a *bona fide* sale and delivery should not be enjoined..... 397
when collection of tax will be enjoined..... 623

INSANE PERSONS.
insane person of means is liable to county for his support in the county asylum..... 537
intention of county officials to charge for support of insane person at county asylum does not enter into the case... 537

INSOLVENCY.—See DEBTOR AND CREDITOR.

INSTRUCTIONS.
when failure of instructions to limit amount of recovery to the *ad damnum* is harmless..... 156
practice of singling out name of witness in an instruction relating to credibility is disapproved..... 164
when instruction as to effect of possession of stolen property is not erroneous..... 173

INSTRUCTIONS.—*Continued.* PAGE.
a party cannot complain of the refusal of an instruction stating an abstract rule of law 197
language of instruction construed as not misleading..... 203
if facts are admitted in suit for terminating contract of employment, the court should instruct the jury whether such facts are a justification for plaintiff's discharge.... 221
court may refuse to give a peremptory instruction asked after the series have been given..... 274
requirement in first part of instruction that jury base findings upon the evidence need not be repeated in each succeeding clause..... 286
instruction which selects one item of evidence and states that a certain conclusion does not follow, as a matter of law, from such fact, is misleading. 298
when an instruction is properly refused which attempts to state presumption against negligence..... 298
instructions should be based upon the evidence 298
when instruction is not objectionable..... 298
when instruction that master is under no greater obligations to look out for servant's safety than the servant is, is properly refused..... 382
when inaccuracy of instruction will not reverse..... 466
instruction should not attempt to state to the jury what particular acts constitute negligence..... 480
when instruction as to effect of change of street grade is not objectionable because it makes no reference to effect of entire improvement..... 518
instruction which invites the jury to speculate upon the possibility of permanent injury is erroneous, where there is no evidence that such a result is probable..... 526
an instruction authorizing a verdict if certain facts exist must state all the facts essential to such verdict..... 526

INSURANCE.
two per cent tax on premiums received by foreign insurance companies is both a license fee and a State tax superseding other personal property taxes..... 329
two per cent tax on premiums received by foreign insurance companies is not a commutation of a State tax, but is, of itself, a State tax..... 329
act of 1899, which levies two per cent tax on foreign insurance companies, is unconstitutional, in that it releases such companies from municipal taxes..... 329

ITINERANT VENDORS OF DRUGS.
what must be shown to sustain conviction under section 8 of Medicine and Surgery act of 1899..... 361

JUDGMENTS AND DECREES.—See RES JUDICATA. PAGE.
right of probate court to order sale, by guardian, of judgment rendered in favor of minor 108
when purchaser of assignment of judgment is bound to ascertain seller's authority as agent 108
filing assignment of judgment with clerk of court for record is not notice to any one 109
assignment of judgment transfers only an equitable title. 109
essentials of decree canceling tax deed as a cloud 193
if court had jurisdiction of condemnation suit, the validity of its judgment cannot be attacked in a special assessment proceeding to pay the judgment 490

JURISDICTION.
when freehold is involved on appeal from decree enjoining collection of judgment against complainant for obstructing an alleged public highway 154
when freehold is involved in attachment suit 244
a franchise is not involved in a suit to set aside or redeem from a conveyance of letters patent 266
case must relate directly to the revenue in order to give Supreme Court jurisdiction upon that ground 292
when Supreme Court cannot entertain appeal 292
a court of equity has jurisdiction to enjoin the collection of a tax not authorized by law and wholly illegal and void. 388
a freehold is not involved in a proceeding to cancel a certificate of sale as a cloud on title 394
county court has jurisdiction of assumpsit by county to recover for support of insane person where the damages are laid at $1000 537

LACHES.
there can be no *laches* where there is no knowledge 206
when *laches* in discovering fraud will not be imputed 206
Attorney General may file information against a drainage district regardless of lapse of time since organization... 311

LANDLORD AND TENANT.
landlord is bound to disclose to tenant concealed defects of which he has knowledge 569
landlord is liable in damages for failure to disclose to tenant the fact of presence of sewer gas upon the premises. 569

LAW AND FACT.
when question of assumed risk is one of fact 382
it is a question of fact whether a motorman keeps such a lookout as circumstances require 410

LAW AND FACT.—*Continued.* PAGE.
whether mortgage by a corporation was executed without authority is a question of fact..... 444
question of fact cannot be converted into one of law by putting it in the form of a proposition of law to be held by the court..... 445
whether city ratified contract is a question of fact..... 581

LEASES.—See LANDLORD AND TENANT.
life tenant cannot bind remainder-man by a lease in which he agrees, at termination of the lease, to buy buildings erected upon the property by the lessee..... 71
failure of city to deny execution of lease by verified plea is an admission of its execution..... 260
when lease is admissible against city without proof of the regularity of steps taken by city authorities in the matter of its execution..... 260

LEGISLATURE.—See CONSTITUTIONAL LAW.

LIENS.—See MORTGAGES.

LIMITATIONS.
when amendment of creditor's bill does not introduce new cause of action..... 21
when statute begins to run against remainder-men whose interests are in separate tracts allotted to the several life tenants by partition among them..... 40
when amendment of declaration in action for negligence does not state a new cause of action..... 281
facts under which Statute of Limitations will be applied.. 304
what does not suspend running of Statute of Limitations. 304
effect of plaintiff's failure to allege due care in an original declaration..... 466
when new promise sufficiently identifies debt..... 599
a new promise is not to be construed as applying only to such portion of debt as is not barred..... 599
new promise is sufficient although amount to be paid is not specified, where such amount is a matter of computation which has not been made..... 599
a new promise directed by a party to be communicated to the creditor is not made to a stranger..... 599

LOAN ASSOCIATIONS.
the act of 1895, providing for assessing stock of loan association to the stockholders and the real estate to the association, is valid..... 388
a tax upon property of a loan association not levied in accordance with the requirements of the act of 1895 is void. 388

LUNATICS. PAGE.
insane person of means is liable to county for his support in the county asylum..... 537
intention of county officials to charge for support of insane person at county asylum does not enter into the case.... 537

MANDAMUS.
when electric light company may be compelled to furnish customer with free transformer..... 626

MARRIAGE.—See HUSBAND AND WIFE.
if relation of marriage has actually been created, subsequent admissions of wife to the contrary have no effect to dissolve the marriage tie..... 432
evidence reviewed and held to establish all the elements of a common law marriage..... 432

MASTER AND SERVANT.
servant does not assume increased hazard due to the master's own negligence..... 15
facts under which court should not direct a verdict for the defendant in action by car repairer for injuries..... 15
what evidence is sufficient to go to the jury upon question whether place where miner received his injury was an exit to the escapement shaft..... 156
master's duty of furnishing safe place for servant to work cannot be delegated, so as to relieve master from liability for its negligent performance..... 156
in action for willful violation of Mines act the question of plaintiff's contributory negligence cannot be raised..... 156
a contract by a theatrical performer to render "satisfactory services" means satisfactory to the employer..... 221
servant has a right to assume that master will not expose him to unreasonable risk..... 344
right and duty of servant to obey master's commands..... 344
degree of care to be exercised toward servant does not rest wholly in the master's own judgment..... 345
what sufficient to warrant submission of case to jury in an action by servant for personal injuries..... 345
master must use reasonable care to see that place where servant is to work is safe..... 382
servant assumes only such risks of service as cannot be obviated by master's exercise of due care..... 382
when question of assumed risk is one of fact..... 382
when instruction that master is under no greater obligation to look out for servant's safety than the servant is, is properly refused..... 382

MASTER AND SERVANT.—*Continued.* PAGE.
when servant's knowledge of danger does not amount to an assumption of the risk..... 382
relation of fellow-servants does not depend upon acquaintanceship of the parties nor the length of time they have worked together..... 612
when relation of fellow-servants exists..... 612

MEDICINE AND SURGERY.
question what is "practicing medicine," within the meaning of the statute, is not one for expert testimony..... 361
party merely recommending and selling a mechanical device for relieving pain is not practicing medicine..... 361
what must be shown to sustain conviction under section 8 of Medicine and Surgery act of 1899..... 361

MENTAL CAPACITY.
that testator was at times during last illness in a comatose condition is not inconsistent with his possession of testamentary capacity at other times..... 147

MILITIA.
a city is not empowered to call out the militia to suppress a riot, and is not liable for the expense when the militia is sent by the State authorities..... 54
a city is not liable for rent of ground occupied as a camp by State militia sent to suppress a riot, nor for damages done by them to the grounds..... 55

MINES.
in action for a willful violation of the Mines act the question of the plaintiff's contributory negligence does not enter into the case..... 156
what tends to show negligence in placing props in mine... 594
what are not such rules as are contemplated by section 32 of Mines act of 1899..... 594
mine rules are void, as against public policy, in so far as they are claimed to operate as a contract against the negligence and dereliction of the company..... 594

MINORS.—See GUARDIAN AND WARD.
at common law guardian had power to sell ward's personal property without an order of court..... 108
common law powers of guardians not inconsistent with our statutes still exist in Illinois..... 108
right of probate court to order sale of judgment rendered in favor of a minor..... 108
child under seven years of age is not chargeable with contributory negligence..... 410

MINORS.—*Continued.* PAGE.
motorman should use great care to avoid injuring child... 410
alleged admissions of young child as to manner of receiving injury should be received with great caution..... 410
law presumes pecuniary loss to father from death of son.. 480
age is not the only element involved in the question of the exercise of due care by a minor..... 526
newsboy riding upon tail-board of wagon in crowded street must use due care for his safety..... 526

MISTAKE.
parol evidence is not admissible to clear up or explain an ambiguity appearing upon face of a will..... 230
equity has no power to reform a will..... 230
when a mistake in date alleged in plea in *quo warranto*, referring to notices of an election, may be rejected as surplusage 310

MOBS.—See RIOTS.

MORTGAGES.
what must be shown by trust company to whom a trustee has fraudulently transferred, as collateral security, a note and trust deed to which he has no title..... 96
when a purchaser of a note and trust deed is charged with notice of such facts as defeat its right to protection against legal holder of the note..... 96
when accrued rent cannot be applied on deficiency decree. 189
receiver in foreclosure holds the rents and profits collected during the redemption period for the holder of equity of redemption..... 253
what not proper disbursements by receiver..... 253
receiver may pay insurance on property..... 253
when affidavit to extend chattel mortgage will be regarded as filed in time..... 444
when acknowledgment of chattel mortgage is valid..... 444
whether a mortgage by corporation was executed without authority is a question of fact..... 444
when party is not an innocent purchaser as against holder of trust deed..... 472
mortgagee's lien is not affected by arrangements between the mortgagor and his grantees..... 472
unauthorized release of trust deed has no effect as between the original parties or subsequent purchasers with notice 472
effect of trustee's possession of notes secured by deed..... 472
to create a lien upon homestead estate of mortgagor, the certificate of acknowledgment must show that the estate was waived and relinquished..... 554

MORTGAGES.—*Continued.* PAGE.
an acknowledgment of a mortgage to a corporation taken by a stockholder is void, but an officer not a stockholder is qualified to take the acknowledgment..... 554
effect, as to notice, of recording a mortgage having a void certificate of acknowledgment..... 554

MOTIONS.—See TRIAL.

MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.
city is but an agency of the State in discharge of certain duties, among which is the duty to suppress riots 54
city has no power to call out the militia to suppress riots.. 54
city is not liable for expense of militia called out to suppress mobs and riots..... 54
duty of State to interfere to suppress mobs and riots with the military forces does not depend upon being notified by the mayor of the necessity..... 55
a city is not liable for rent of ground occupied as a camp ground by State militia called to suppress riots, nor for damages done by them to the grounds..... 55
when city is liable for bridge-tender's negligence..... 197
city council has power to designate portions of street to be used for roadways and other portions for sidewalks..... 215
council may improve so much of roadway of a street as it deems necessary for use of the public..... 215
failure of city to deny execution of lease by verified plea is an admission of its execution..... 260
section 33 of Practice act, providing that no "person" shall deny execution of written instrument except by verified plea, includes municipal corporations..... 260
when lease is admissible against city without proof of regularity of steps taken by city authorities in the matter of its execution..... 260
plaintiff not required, in every suit against a city, to show that city is not indebted beyond the constitutional limit. 260
admissibility of proof of condition of a defective sidewalk at places other than where the accident occurred..... 288
when evidence of subsequent repairs is admissible..... 288
evidence that other persons had stumbled over the same stake in a sidewalk is admissible as tending to show the common source of the accidents was dangerous..... 288
interference with access to property by changing grade of street is a damage for public use, within the meaning of the constitution..... 496
city is liable for damages for changing grade of the street, whether change is made by city or by some corporation in obedience to track elevation ordinance..... ...519, 496

MUNICIPAL CORPORATIONS.—*Continued.* PAGE.
whether an act is within the police power is a question for the courts to determine ... 496
diversion of traffic is not an element of damage in suit for damage from changing grade of street ... 496
what evidence improper on question of damages ... 497
when declaration against city states a good case for damages from changing grade of street ... 518
what evidence competent in action against city for damages from changing grade of street ... 518
plaintiff may show that tenants moved out because grade of the street was changed and that the premises were in good repair ... 518
both damages and benefits to the property from street improvement must be real and substantial ... 519
city has power to acquire land for bridge purposes ... 580
right of a city to contract for easement of right to swing bridge over land and to agree to construct a vault under sidewalk for land owner to use for boiler-room ... 580
if lawful contract is irregularly made by city officers the contract may be ratified by city's acts and the city be estopped to deny its validity ... 580
when expense of work may properly be paid from appropriation for construction of bridge ... 580
city officers presumed to act for best interests of city ... 580
whether city ratified contract is a question of fact ... 581

NEGLIGENCE.
a servant does not assume the increased hazard due to the master's own negligence ... 15
facts under which court should not direct a verdict for the defendant in action by car repairer for injuries ... 15
what evidence is sufficient to go to the jury upon question whether place where a miner was injured was an exit to the escapement shaft ... 156
master's duty of furnishing safe place for servant to work cannot be delegated, so as to relieve the master from liability for its negligent performance ... 156
in action for willful violation of the Mines act the question of the plaintiff's contributory negligence does not enter into the case ... 156
when city is liable for bridge-tender's negligence ... 197
when amendment of declaration in action for negligence does not state a new cause of action ... 281
when evidence of subsequent repairs is admissible ... 288
evidence that other persons had stumbled over the same stake in a sidewalk is admissible as tending to show the common source of the accidents was dangerous ... 288

NEGLIGENCE.—*Continued.* PAGE.
admissibility of proof of condition of a defective sidewalk at places other than where the accident occurred..... 288
when instruction which attempts to state the presumption against negligence is properly refused 298
street cars should approach street crossings under control. 298
a servant has right to assume that master will not expose him to unreasonable risk..... 344
right and duty of servant to obey master's commands..... 344
the degree of care to be used toward servant does not rest wholly in the master's own judgment 345
what evidence sufficient to warrant submission of case to jury in action by servant for personal injuries..... 345
master must use reasonable care to see that place where servant is to work is safe..... 382
a servant assumes only such risks of service as cannot be obviated by master's use of due care. 382
when servant's knowledge of danger does not amount to an assumption of the risk..... 382
persons in charge of street car should exercise a greater degree of care and watchfulness at street crossings than at other places..... 410
electric cars should not be run at rate of speed incompatible with use of highway by others..... 410
it is a question of fact whether a motorman keeps such a lookout as circumstances require..... 410
motorman should use great care to avoid injuring child... 410
child under seven years of age is not chargeable with contributory negligence..... 410
instruction should not attempt to state to jury what particular acts constitute negligence..... 480
age is not the only element involved in the question of the exercise of due care by a minor for his safety..... 526
newsboy riding upon tail-board of wagon in crowded street must exercise due care for his safety..... 526
what tends to show negligence in placing props in mine... 594
mine rules are void, as against public policy, in so far as they are claimed to operate as a contract against negligence and dereliction of the company..... 594
when relation of fellow-servants exists..... 612

NEGOTIABLE INSTRUMENTS.—See BILLS AND NOTES.

NEW TRIAL.
motions upon pleadings, and other matters arising before trial, furnish no basis for motion for new trial..... 370
motion for new trial is only necessary where the case has been tried by a jury..... 370

NEW TRIAL.—*Continued.* PAGE.
when motion for new trial is improper. 370
when questions are not preserved by continuance of a motion for new trial, so as to permit their being saved by bill of exceptions at subsequent term. 370

NOTICE.
when purchaser of note and trust deed is charged with notice of such facts as defeat its right to protection against the legal holder of the note 96
filing assignment of judgment for record is not notice. . . . 109
effect, as to notice, of recording a mortgage having a void certificate of acknowledgment. 554

NOVATION.
when surrender of a certificate of deposit does not release estate of deceased partner from liability upon the subsequent failure of the banking firm. 136
mere fact that creditor takes separate liability of surviving partners does not release estate of deceased partner. 136

OATH.—See AFFIDAVITS.

OPTIONS.—See BUCKET-SHOPS.

ORDINANCES.—See TAXES; SPECIAL ASSESSMENTS.
ordinance levying school tax need not specify in detail the objects of the tax under each heading. 353
ordinances dividing single improvement into sections, each costing less than $100,000 but aggregating more than such sum, in order to evade the statute, are void. 390
when ordinance is not uncertain in description of kind and depth of sidewalk. 512
an ordinance must be viewed as a whole, and one part or section may be referred to to explain another. 512
when water-pipe ordinance is not unreasonable 591

PARTIES.
partition of an estate among life tenants without making remainder-men parties does not bind latter. 40
if only one complainant appeals from a decree the assignment of errors must be regarded as they affect him only, and if decree is right as to him it will be affirmed 91

PARTITION.
partition of an estate among life tenants without making remainder-men parties does not bind latter. 40
when defendants to partition should not pay any costs. . . . 71

PARTNERSHIP. PAGE.
Supreme Court may review facts on appeal in proceeding to enforce claim against an estate of deceased partner, since the proceeding is an equitable one..... 136
when surrender of a certificate of deposit does not release estate of deceased member of banking firm from liability upon subsequent failure of bank..... 136
rights of creditor against estate of deceased partner..... 136
mere fact that creditor takes separate liability of surviving partners does not release estate of deceased partner. 136
parties engaging in banking business may provide for continuation of business by surviving partners..... 136

PLATS.
plats not conforming to the statute do not have the effect of statutory plats, so as to make the descriptions of the property valid for purposes of taxation..... 353
when description is sufficient for tax purposes..... 353
when plat sufficiently establishes building line..... 575
reservation of building line creates an easement, and it is not necessary that the plat mention or set forth the persons to be benefited by the reservation..... 575
if a deed refers to a plat containing building restrictions, the grantee is not relieved therefrom because they are not mentioned in his deed..... 575
acceptance of dedication of boulevard shown on plat is an acceptance of an appurtenant building restriction..... 575

PLEADING.
when amendment of creditor's bill does not introduce new cause of action..... 21
when bill is bad, on demurrer, for uncertainty..... 65
when defendant has the burden of proving allegations of plea in replevin..... 164
mortgagee alleging the legal effect of mortgage is bound by her construction thereof..... 164
failure of city to deny execution of lease by verified plea is an admission of its execution..... 260
section 33 of the Practice act, providing that no "person" shall deny execution of a written instrument except by verified plea, includes municipal corporations..... 260
when amendment of declaration in action for negligence does not state a new cause of action..... 281
what not essential to a plea in *quo warranto* setting up the respondents' election as drainage commissioners..... 310
when mistake in date alleged in plea in *quo warranto* referring to notices of election may be rejected as surplusage. 310
when plea to information in *quo warranto* need not set forth the organization of drainage district..... 310

PLEADING.—*Continued.* PAGE.
when allegation as to taking oath of office is sufficient.... 310
party may reply to plea though his demurrer is overruled. 311
when error to sustain a demurrer to replication to plea in *quo warranto* proceedings..... 311
if *certiorari* proceeding is set up in bar of *quo warranto* the petitioner may reply that the record in the *certiorari* proceeding was not a true one. 311
when indictment sufficiently charges a violation of County Civil Service act..... 454
effect of plaintiff's failure to allege due care in his original declaration—limitations..... 466
section 23 of Practice act, as to amendments, construed.. 466
evidence of a miscarriage may be shown under general allegations of damages..... 466
verdict in favor of plaintiff cures a defective statement of a good cause of action..... 518
when declaration against city states a good case..... 518
declaration need not negative matters of defense..... 518
when admission in answer to foreclosure bill is not binding as an admission that defendants had released homestead. 554
when objection that allegation of answer to a foreclosure bill is but a statement of a legal conclusion cannot prevail on appeal..... 554

POLICE POWER.
whether an act is within the police power is a question for the courts to determine 496

PRACTICE.—See APPEALS AND ERRORS; TRIALS.
evidence should be condensed in narrative form in the abstract of record, so as to clearly present its substance.. 15
brief and argument should refer to abstract of record for evidence, and not repeat it at length..... 15
if only one complainant appeals from a decree the assignment of errors must be regarded as they affect him only, and if decree is right as to him it will be affirmed..... 91
a decree entered in accordance with the verdict of a jury upon the issues of mental capacity and undue influence will not be lightly disturbed..... 119
provision of Practice act making Appellate Court's findings of fact conclusive upon the Supreme Court does not apply to chancery cases..... 136
Supreme Court may review facts on appeal in proceeding to enforce claim against the estate of deceased partner, since the proceeding is an equitable one..... 136
if the only appeal bond filed within the time allowed is approved by the clerk without authority, the defect cannot be cured by filing a new bond... 162

PRACTICE.—*Continued.* PAGE.
clerk has no power to approve an appeal bond unless authorized by an order of the court 162
party specifying grounds for new trial is confined, on appeal, to the reasons specified..... 164
practice of singling out name of witness in an instruction relating to credibility is disapproved..... 164
one cannot complain of error not affecting his interest.... 189
when accrued rent cannot be applied on deficiency decree. 189
decree must be reversed if no evidence to sustain it is preserved, either by certificate or by recital in decree..... 193
material allegation of a bill in chancery neither admitted nor denied must be supported by proof..... 193
when Appellate Court's decision is final 258
counter-affidavits may be filed on a motion to set aside default and vacate judgment..... 277
how to proceed where trial court overrules a motion for leave to file bill of exceptions 277
requirement in the first part of instruction that jury base findings upon the evidence need not be repeated in each succeeding clause..... 286
when bill of exceptions must be presented..... 370
motions upon pleadings, and other matters arising before trial, furnish no basis for motion for new trial 370
when motion for new trial is improper..... 370
motion for a new trial is only necessary when the case has been tried by a jury..... 370
when questions are not preserved by continuance of a motion for new trial, so as to premit their being saved by bill of exceptions at later term..... 370
when affidavit to extend chattel mortgage is filed in time. 444
a question of fact cannot be converted into one of law by putting it in the form of a proposition of law to be held by the court..... 445
section 23 of Practice act, as to amendments, construed.. 466
when inaccuracy of instruction will not reverse..... 466
when errors of procedure will not reverse..... 497
same party cannot have more than one petition for a rehearing in the same cause..... 497
verdict in favor of plaintiff cures a defective statement of a good cause of action 518
when declaration against city states a good case..... 518
instruction authorizing verdict if certain facts exist must embrace all the conditions essential to such a verdict .. 526
when objection that appeal was improperly allowed comes too late..... 606

PRESCRIPTION.—See HIGHWAYS.

PRESUMPTIONS. PAGE.
the law does not presume that a purchase by brother from sister is fraudulent because of their relationship..... 127
when instruction which attempts to state the presumption against negligence is properly refused..... 298
if the law prescribes both the time and place for holding an election, every voter is presumed to take notice of such law..... 310
law presumes pecuniary loss to father from death of son.. 472
city officers presumed to act for best interests of city..... 580

PRINCIPAL AND AGENT.
when admissions by agent are not inadmissible upon the ground that they tend to contradict the terms of written assignment of stock to him by principal..... 133
if the execution of an instrument for a corporation is not denied by verified plea, the authority of the agent to execute it need not be proved..... 260

PRIVILEGE.
effect where a witness refuses to answer relevant question upon the ground of privilege..... 397

PROPOSITIONS OF LAW.
proposition calling for court's opinion upon a question of fact is properly refused..... 304
a question of fact cannot be converted into one of law by putting it in the form of a proposition of law to be held by the court..... 445
propositions are properly refused which merely call for special findings of fact..... 484

PUBLIC IMPROVEMENTS.—See SPECIAL ASSESSMENTS.
what not an arbitrary subdivision of land..... 146
city council has power to designate portions of a street for roadways and other portions for sidewalks..... 215
council may improve so much of roadway of a street as it deems necessary for use of public..... 215
court has power to inquire whether division of single improvement into sections was to evade section 11 of the Improvement act of 1897..... 390
ordinances dividing improvement into sections to evade the statute concerning publication are void..... 390
improvement resolutions may be passed by a majority of the local improvement board..... 512
section 7 of act of 1897 does not require ten days' notice of public hearing to be given, and six days' notice is not unreasonably short..... 512

PUBLIC IMPROVEMENTS.—*Continued.* PAGE.
confirmation judgment entered after act of 1901 took effect should not include the cost of making the assessment... 512
before courts can declare an ordinance unreasonable it must be clearly made to appear so..... 591
when water-pipe ordinance is not unreasonable..... 591
when improvement as constructed is essentially different from the one authorized by the ordinance..... 603

PUBLIC POLICY.
mine rules are void, as against public policy, in so far as they are claimed to operate as a contract against the negligence and dereliction of the company..... 594

QUO WARRANTO.
what not essential to a plea in *quo warranto* setting up the respondents' election as drainage commissioners..... 310
when plea to information in *quo warranto* need not set forth the organization of drainage district..... 310
when error to sustain demurrer to replication to a plea in *quo warranto* proceedings.. 311
jurisdictional facts relating to organization of a drainage district may be inquired into in *quo warranto*, and if alleged in plea may be denied by replication..... 311
if *certiorari* proceeding is set up as bar to *quo warranto*, petitioner may reply that record in the *certiorari* proceeding was not a true one..... 311
judgment in *certiorari* proceeding affecting a drainage district is not a bar to a proceeding by *quo warranto* to test legality of organization..... 311
Attorney General may file information against a drainage district regardless of lapse of time since organization .. 311

RAILROADS.—See STREET RAILWAYS.
when condemnation verdict will be upheld..... 370
benefits and damages attending original purchase of right of way cannot be litigated in a subsequent proceeding to condemn additional land for tracks..... 371
what evidence competent as tending to show intent of the deceased to become passenger on train..... 480
when assessment for "omitted taxes" cannot be sustained. 606
county court has no power to perform assessor's duties by classifying railroad property upon application for judgment of sale for taxes..... 606

RATIFICATION.
if lawful contract is irregularly made by city officers, city may ratify contract by its acts and be estopped to deny its validity..... 580

REAL PROPERTY.—See WILLS; TRUSTS; MORTGAGES.
estates tail abolished in Illinois by section 6 of the Conveyance act, which changes them into estates for life with remainder in fee..... 40
when interests of heirs pass by deed..... 40
partition of estate among life tenants without making remainder-men parties does not bind latter..... 40
when statute begins to run against remainder-men whose interests are in separate tracts allotted to the several life tenants by partition among them..... 40
if a contingent remainder is devised the fee descends to the heir, and when the contingency happens the heir's estate opens to let in the remainder..... 40
the law presumes more in favor of delivery in voluntary settlements than in cases of bargain and sale..... 71
marriage is a sufficient consideration for a trust deed settling life estate on wife, and if title passes for benefit of wife it passes for all purposes of the deed..... 71
when widow has no lien for money loaned to husband..... 71
life tenant cannot bind remainder-man by a lease in which he agrees, at end of lease, to buy the building erected on the property by the lessee..... 71
if first taker under a deed creating an estate tail at common law refuses to accept the deed no estate vests as to the remainder..... 119
when plat sufficiently establishes building line..... 575
reservation of building line creates an easement, and it is not necessary that the plat mention or set forth the persons to be benefited by the reservation..... 575
if a deed refers to a plat containing building restrictions, the grantee is not relieved therefrom because they are not mentioned in his deed..... 575
acceptance of dedication of boulevard shown on plat is an acceptance of an appurtenant building restriction..... 575
grantor may convey subject to such building restrictions as he sees fit, and if grantee accepts deed the restrictions may be enforced by one having the right..... 633
party must show right to enforce building restriction..... 633
when building restriction contained in a deed will not be enforced at suit of grantor's daughter..... 633

RECEIVERS.
receiver in foreclosure holds the rents and profits collected during the redemption period for the benefit of holder of the equity of redemption..... 253
what not proper payments by receiver in foreclosure..... 253
receiver in foreclosure may pay insurance on property..... 253

RECORDING LAWS. PAGE.
filing assignment of judgment with clerk of court for record is not notice to any one..... 109
effect, as to notice, of recording mortgage having a void certificate of acknowledgment..... 554

RECOUPMENT.
breach of an oral contract within the Statute of Frauds cannot be set up as a defense by way of recoupment to suit on promissory note..... 295

REHEARING.
same party cannot have more than one petition for rehearing in the same cause..... 497

RELEASE.
unauthorized release of trust deed has no effect as between original parties or subsequent purchasers with notice... 472
when party is not an innocent purchaser as against holder of trust deed.. 472
effect of trustee's possession of notes secured by deed..... 472

REMAINDERS.—See REAL PROPERTY; WILLS.

RENT.
city is not liable for rent of ground occupied as a camp by State militia sent to suppress a riot, nor for damages done by them to the grounds..... 55
when accrued rent cannot be applied on deficiency decree. 189
party to whom receipts for rent are given may explain, by oral testimony, why they run in the name of another.... 274

REPLEVIN.
right of defendant in suit on replevin bond to set up title to the property in himself..... 445

RES JUDICATA.
partition of estate among life tenants without making remainder-men parties does not bind latter..... 40
suspension of an attorney for contempt of court is not *res judicata* in subsequent disbarment proceeding..... 250
judgment in *certiorari* proceeding affecting a drainage district is not a bar to a *quo warranto* proceeding to test the legality of its organization..... 311

REVENUE.—See TAXES.

RIGHT OF WAY.—See HIGHWAYS.

RIGHTS AND REMEDIES.—See ACTIONS AND DEFENSES.
when a party is entitled to have conveyances set aside in equity upon the ground of fraud 206
electric light company must treat its customers without unjust discrimination 626
when electric light company may be compelled to furnish free transformer to customer 626
when building restriction contained in deed will not be enforced at suit of grantor's daughter 633

RIOTS.
the duty of a city to suppress mobs and riots is of a public character, and in discharging it the city acts as a public agency of the State 54
a city is not empowered to call out the militia to suppress riots, and is not liable for the expense when the militia is sent in by State authorities 54
duty of State to send militia to city to aid in suppressing riots does not depend upon notification from the mayor of the necessity therefor 55
a city is not liable for rent of ground occupied as a camp ground by State militia sent to suppress a riot, nor for damages done by them to the grounds 55

ROADS AND BRIDGES.—See HIGHWAYS.

ROBBERY.
conviction may be sustained though proof of character and denominations of money stolen is not strict 211
when conviction will be sustained on appeal 211
when conviction of crime of robbery will not be reversed for improper conduct of prosecuting attorney 211

SALES.—See ASSIGNMENTS.
what must be shown by trust company to whom a trustee has fraudulently transferred, as collateral security, a note and trust deed to which he had no title 96
when purchaser of note and trust deed is charged with notice that seller is not the legal holder 96
a purchaser to whom the seller has delivered possession of personal property is protected against a subsequent attempt to transfer title by bill of sale 269
when party is not an innocent purchaser as against holder of trust deed 472
mortgagee's lien is not affected by arrangements between the mortgagor and his grantees 472
unauthorized release of trust deed has no effect as between original parties or subsequent purchasers with notice... 472
effect of trustee's possession of notes secured by deed..... 472

SCHOOLS. PAGE.
ordinance levying tax for building purposes and for educational purposes need not specify in detail the objects of such tax 353
specification, in appropriation and tax levy ordinances, of school taxes as for "building purposes" and "educational purposes" is sufficiently definite 542
amendment of School law by act of April 21, 1899, authorizing levy of two and one-half per cent tax for "building" and for "educational" purposes, is valid 542

SEPARATE MAINTENANCE.
if the relation of marriage has actually been created, subsequent admissions of the wife to the contrary have no effect to dissolve the marriage tie 432
evidence reviewed and held to establish all elements of a common law marriage 432

SETTLEMENT OF ESTATES.
general policy of the law concerning administration 179
when superior diligence by creditor confers no advantage. 179
administration in domicil of deceased is principal one 179
duties and powers of ancillary administration 179
when distribution of assets in different States is proper ... 179

SIGNATURES.
admissibility of certificate of eligibility bearing stamped signatures of civil service commissioners 454
when a civil service commissioner cannot say that illegal certificate of eligibility is not his act 455

SPECIAL ASSESSMENTS.
what not an arbitrary subdivision of land 146
city council may improve so much of roadway of street as it deems necessary for use of the public 215
when general ordinance fixing width of sidewalks is admissible to show width of roadways 215
in a special assessment proceeding Supreme Court must accept the evidence in the record as to benefits 215
court has power to inquire whether division of single improvement into sections was to evade section 11 of the Improvement act of 1897 390
ordinances dividing improvement to evade statute are void. 390
effect upon an assessment proceeding where condemnation judgment is for part, only, of the land described in the condemnation ordinance 490
when section 53 of article 9 of the City and Village act applies to special assessment to pay condemnation judgment for widening street 490

SPECIAL ASSESSMENTS.—*Continued.* PAGE.
assessment to pay condemnation judgment is collateral to condemnation proceeding..... 490
former dedication of property condemned for widening a street cannot be set up in an assessment proceeding to pay the judgment..... 490
what is a sufficient description of street railroad property assessed to pay condemnation judgment..... 490
when ordinance is not subject to objection that it provides for two kinds of sidewalks..... 512
when ordinance is not uncertain in description of depth of concrete sidewalks..... 512
an ordinance must be viewed as a whole, and one part or section may be referred to for the purpose of explaining another part or section..... 512
improvement resolutions may be passed by a majority of the local improvement board..... 512
section 7 of the act of 1897 does not require ten days' notice of public hearing to be given, and six days' notice is not unreasonably short..... 512
confirmation judgment entered after the act of 1901 took effect should not include cost of making and levying the assessment..... 512
before court can declare ordinance unreasonable it must be clearly made to appear so..... 591
when water-pipe ordinance is not unreasonable..... 591
when improvement constructed is essentially different from one authorized by the ordinance..... 603

STATE MILITIA.—See RIOTS.

STATUTE OF FRAUDS.
breach of an oral contract within the Statute of Frauds cannot be set up as a defense, by way of recoupment, to suit on promissory note..... 295

STATUTE OF LIMITATIONS.—See LIMITATIONS.

STATUTES.—See CONSTRUCTION; CONSTITUTIONAL LAW.
constitution does not require that the number of the section to be amended be specified..... 542
mistake in number of section to be amended does not invalidate amendatory act, if there is no uncertainty as to the subject of the amendment..... 542

STOCKS.
if stock has no ascertainable market value, evidence of the value of corporation's property over its indebtedness is competent as tending to fix value of stock..... 133

STREET RAILWAYS. PAGE.
when instruction which attempts to state the presumption against negligence is properly refused..... 298
cars should approach street crossings under control..... 298
persons in charge of car should exercise a greater degree of watchfulness at street crossings than other places.... 410
electric cars should not be run at speed incompatible with use of highway by others..... 410
it is a question of fact whether a motorman keeps such a lookout as circumstances require..... 410
motorman must use great care to prevent injuring child.. 410
what evidence sufficient to go to jury upon the question of company's negligence in injuring child..... 410
child under seven years of age is not chargeable with contributory negligence..... 410

STREETS AND ALLEYS.—See HIGHWAYS; SPECIAL ASSESSMENTS.

SUB-WAYS.
city is liable for damages to property from changing grade of street to build a sub-way in compliance with a track elevation ordinance.....496, 519

TAX DEEDS.
essentials of decree canceling tax deed as a cloud..... 193

TAXES.—See SPECIAL ASSESSMENTS.
two per cent tax on premiums received by foreign insurance companies is both a license fee and a State tax superseding other personal property taxes..... 329
section 1 of article 9 of constitution construed as to right of legislature to tax occupations..... 329
two per cent tax on premiums received by foreign insurance companies is not a commutation of a State tax, but is, of itself, a State tax..... 329
under sections 9 and 10 of article 9 of constitution, legislature must require that all taxable property within limits of municipal corporations shall be taxed for their debts. 329
legislature cannot release property from municipal taxes. 329
two per cent tax act of 1899 is unconstitutional, in that it releases foreign insurance companies from payment of municipal or local taxes..... 329
plats not conforming to the statute do not have the effect of statutory plats, so as to make the descriptions therein valid and sufficient..... 353
when description of property for taxation is sufficient.... 353
when a property owner is estopped to deny validity of description of property for taxation..... 353

TAXES.—*Continued.* PAGE.
ordinance levying tax for building purposes and for educational purposes need not specify in detail the objects of such taxes..... 353
a court of equity has jurisdiction to enjoin the collection of tax not authorized by law and wholly illegal and void. 383
act of 1895, providing for assessing stock in loan associations to the stockholders and the real estate to the association, is valid..... 388
a tax upon property of a loan association, levied under a method of assessment not provided for by law, is void... 388
what necessary to be shown to recover from municipality taxes illegally collected and paid over..... 542
payment of tax to prevent sale is not "under compulsion". 542
effect of voluntary payment of illegal taxes..... 542
specification, in appropriation and tax levy ordinances, of school taxes as for "building purposes" and "educational purposes" is sufficiently definite..... 542
what a sufficient description of property for taxation..... 542
amendment of School law by act of April 21, 1899, authorizing levy of two and one-half per cent tax for "building" and for "educational" purposes, is valid..... 542
when assessment as for "omitted taxes" cannot be sustained. 606
county court has no power to perform assessor's duties by classifying railroad property upon application for judgment of sale for taxes..... 606
when collection of tax will be enjoined..... 623
if one assigning notes and mortgages fails to disclose names of assignees to board of review, the latter has no power to assess them to the assignor..... 623

TOWNS.—See MUNICIPAL CORPORATIONS.

TRACK ELEVATION.
a city is liable for damages for changing grade of street, whether change is made by city or by some corporation in obedience to track elevation ordinance.....519, 496

TRIAL.
facts under which court should refuse to direct a verdict for defendant in action by car repairer for personal injuries received by him..... 15
what sufficient to go to jury upon question whether place where miner received his injury was an exit to escapement shaft..... 156
rule as to discrediting testimony of witness..... 164
when refusal to sustain challenge for cause is harmless... 164
when denial of motion to exclude evidence is proper..... 203

TRIAL.—*Continued.* PAGE.
if facts are admitted in suit for terminating contract of employment, the court should instruct the jury whether such facts are a justification for plaintiff's discharge... 221
court may refuse to give a peremptory instruction asked after the series have been given..... 274
counter-affidavits may be filed on a motion to set aside default and vacate judgment..... 277
when refusal to set aside default is proper..... 277
how to proceed where the trial court overrules motion for leave to file bill of exceptions..... 277
what sufficient to warrant submission of case to jury in an action by servant for personal injuries..... 345
if evidence shows a breach of legal contract the case must go to the jury..... 365
when bill of exceptions must be presented..... 370
motions upon pleadings, and other matters arising before trial, furnish no basis for motion for new trial..... 370
when motion for new trial is improper..... 370
motion for new trial is only necessary where the case has been tried by a jury..... 370
when questions are not preserved by continuance of motion for new trial to subsequent term..... 370
when matters are not preserved in bill of exceptions and may be expunged upon appeal..... 370
what sufficient to go to jury upon question of a street car company's negligence in injuring child..... 410
propositions are properly refused which merely call for special findings of fact..... 484

TRUST DEEDS.—See MORTGAGES.

TRUSTS.
effect where trustee mingles trust funds with his own..... 21

VERDICT.
verdict for plaintiff cures a defective statement of a good cause of action..... 518

VILLAGES.—See MUNICIPAL CORPORATIONS.

VOTERS.—See ELECTIONS.

WAYS.—See HIGHWAYS.

WILLS.
if a contingent remainder is devised, the fee descends to the heir, and when the contingency happens the heir's estate opens to let in the remainder..... 40

WILLS.—*Continued.* PAGE.
will construed as passing, under section 6 of Conveyance act, an estate for life with remainder in fee..... 40
word "absolute," although used to describe an interest in property, may be given a more restricted meaning than the word "unqualified"..... 83
language construed as not devising fee of a right of way to the testator's son, but as giving him an easement of passage as it was used in testator's lifetime..... 83
party electing to accept a provision of a will for her benefit adopts the will in all its provisions..... 91
that testator was at times during last illness in a comatose condition is not inconsistent with his possession of testamentary capacity at other times..... 147
intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in will. 230
parol evidence is not admissible to clear up or explain an ambiguity appearing upon the face of the will..... 230
equity has no power to reform a will..... 230
fact that a testamentary beneficiary has no equity against the heir is one of the reasons why equity has no power to reform a will..... 230
when attestation is in testator's presence..... 484
beneficiaries under a will are not competent to testify in its favor against heirs-at-law..... 484
proponents not limited to subscribing witness in the circuit court upon subject of testamentary capacity..... 484
propositions are properly refused which merely call for special findings of fact..... 484

WITNESSES.
practice of singling out name of witness in instruction relating to credibility is disapproved..... 164
rule as to discrediting testimony of witness..... 164
effect where witness refuses to answer relevant question upon the ground of privilege..... 397
beneficiaries under a will are not competent to testify in its favor against heirs-at-law..... 484
proponents are not limited to subscribing witnesses in circuit court upon subject of testamentary capacity..... 484

WORDS AND PHRASES.
word "absolute," though used in a will in connection with the description of an interest in property, may be given a more restricted meaning than "unqualified"..... 83

TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR EXPLAINED IN THIS VOLUME.

A

PAGE.

Abraham *v.* Huntington, 19 Ill. 403 163
Adams *v.* Smith, 58 Ill. 417 303
Albers Commission Co. *v.* Sessel, 193 Ill. 153 562
Alexander *v.* Merrick, 121 Ill. 606 196
Alford *v.* Dannenberg, 177 Ill. 331 375
Allen *v.* City of Chicago, 176 Ill. 113 493
Allen *v.* People, 82 Ill. 610 172
Alling *v.* Wenzel, 133 Ill. 264 242
Allwood *v.* Cowen, 111 Ill. 481 625
Alton, City of, *v.* County of Madison, 21 Ill. 114 540
American Loan Co. *v.* Minnesota and N. W. R. R. Co. 157 Ill. 641. 267
Ames & Frost Co. *v.* Strachurski, 145 Ill. 192 285
Anderson *v.* Hayes, 101 Wis. 538 572
Andrews *v.* Fry, 104 Mass. 234 409
Arnold *v.* Stock, 81 Ill. 407 448
Association *v.* Spencer, 26 Conn. 195 ..... 563, 562

B

Baltimore and Ohio Southwestern Ry. Co. *v.* Slanker, 180 Ill. 357. 470
Bancroft *v.* City of Cambridge, 126 Mass. 438 502
Bank *v.* Radtke, 87 Iowa, 363 563
Bank *v.* Rivers, 36 Fla. 575 ..... 565, 563
Barbour *v.* Scottish-American Mortgage Co. 102 Ill. 121 479
Barnard & Co. *v.* County of Sangamon, 190 Ill. 116 586
Barrett *v.* Queen City Cycle Co. 179 Ill. 68 278
Bates *v.* Gillett, 132 Ill. 287 50
Beal *v.* Harrington, 116 Ill. 113 94
Bearman *v.* Whitney, 20 Me. 413 563
Belden *v.* Woodmansee, 81 Ill. 25 287
Bell *v.* Devore, 96 Ill. 217 37
Belleville, City of, *v.* Citizens' Horse Ry. Co. 152 Ill. 171 140

PAGE.
Bennett *v.* Stout, 98 Ill. 47 249
Betser *v.* Rankin, 77 Ill. 289 116
Blair *v.* Vanblarcum, 71 Ill. 290 44
Blake *v.* People, 109 Ill. 504 326
Bloomington, City of, *v.* Bay, 42 Ill. 503 217
Bloomington, City of, *v.* Legg, 151 Ill. 9 ..... 291, 290
Bloomington, City of, *v.* Pollock, 141 Ill. 346 505
Board of Supervisors of Shelby County *v.* People, 159 Ill. 242 .. 294
Board of Trade *v.* Riordan, 94 Ill. App. 298 408
Bond *v.* Lockwood, 33 Ill. 212 115
Bongard *v.* Core, 82 Ill. 19 249
Bourland *v.* County of Peoria, 16 Ill. 538 116
Bowden *v.* Parrish, 86 Va. 67 563
Bowers *v.* People, 74 Ill. 418 171
Bowlesville Mining and Manf. Co. *v.* Pulling, 89 Ill. 58 163
Boyd *v.* Strahan, 36 Ill. 355 87
Boyle *v.* Levi, 73 Ill. 175 280
Bradley, *Ex parte*, 7 Wall. 364 252
Bradley *v.* Sattler, 156 Ill. 603 483
Bradley *v.* Wescott, 13 Ves. 450 87
Brady *v.* Cole, 164 Ill. 116 567
Brainard *v.* Hudson, 103 Ill. 218 561
Bressler *v.* People, 117 Ill. 422 171
Briggs *v.* Mitchell, 60 Barb. 317 33
Brill *v.* Brill, 15 N. E. Rep. 538 90
Brown *v.* Moore, 38 Tex. 645 563
Bruce, Town of, *v.* Dickey, 116 Ill. 527 586
Brushy Mound, Town of, *v.* McClintock, 146 Ill. 643 156
Brushy Mound, Town of, *v.* McClintock, 150 Ill. 129 229
Buchanan *v.* McLennan, 192 Ill. 480 95
Burke *v.* People, 148 Ill. 70 213
Butcher Steel Works *v.* Atkinson, 68 Ill. 421 297

C

Cairo, Vincennes and Chicago Ry. Co. *v.* Mathews, 152 Ill. 153 .. 359
Calumet Electric Street Ry. Co. *v.* VanPelt, 173 Ill. 70 275
Carr *v.* Miner, 42 Ill. 179 275
Carrico *v.* People, 123 Ill. 198 ..... 322, 319
Carterville Coal Co. *v.* Abbott, 181 Ill. 495 160
Cartwright *v.* McGown, 121 Ill. 388 444
Catlett *v.* People, 151 Ill. 16 328
Central Trust Co. *v.* Wabash, St. L. & P. Ry. Co. 31 Fed. Rep. 246. 425
Cheltenham Improvement Co. *v.* Whitehead, 128 Ill. 279 561
Cheney *v.* Roodhouse, 135 Ill. 257 141
Chicago and Alton R. R. Co. *v.* Becker, 76 Ill. 25 423
Chicago and Alton R. R. Co. *v.* Becker, 84 Ill. 483 ..... 423, 422
Chicago and Alton R. R. Co. *v.* Clausen, 173 Ill. 100 521

PAGE.
Chicago and Alton R. R. Co. *v.* Gregory, 58 Ill. 226..... 422
Chicago and Alton R. R. Co. *v.* Murray, 62 Ill. 326..... 423
Chicago and Alton R. R. Co. *v.* People, 99 Ill. 464..... 611
Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 148 Ill. 573. 385
Chicago, Burl. and Quincy R. R. Co. *v.* Chicago, 166 U. S. 226... 502
Chicago, Burl. and Quincy R. R. Co. *v.* Gunderson, 174 Ill. 495.. 483
Chicago, Burl. and Quincy R. R. Co. *v.* People, 136 Ill. 660..... 546
Chicago, Burl. and Quincy R. R. Co. *v.* State, 47 Neb. 549..... 503
Chicago, City of, *v.* Chicago, R. I. and P. Ry. Co. 152 Ill. 561..229, 227
Chicago, City of, *v.* English, 180 Ill. 476..... 264
Chicago, City of, *v.* Hayward, 176 Ill. 130..... 495
Chicago, City of, *v.* Hesing, 83 Ill. 204..... 422
Chicago, City of, *v.* Jackson, 196 Ill. 496..... 525
Chicago, City of, *v.* Keefe, 114 Ill. 222..... 531
Chicago, City of, *v.* Rumpff, 45 Ill. 90..... 593
Chicago, City of, *v.* Scholten, 75 Ill. 468..... 483
Chicago, City of, *v.* Seben, 165 Ill. 371..... 588
Chicago, City of, *v.* Sherman, 192 Ill. 576..... 153
Chicago City Ry. Co. *v.* Anderson, 182 Ill. 298..... 470
Chicago City Ry. Co. *v.* Hackendahl, 188 Ill. 300..... 38
Chicago City Ry. Co. *v.* Mager, 185 Ill. 336..... 430
Chicago City Ry. Co. *v.* Robinson, 127 Ill. 9..... 414
Chicago City Ry. Co. *v.* Wilcox, 138 Ill. 370.....431, 427, 421, 420
Chicago and Eastern Illinois R. R. Co. *v.* Hines, 132 Ill. 161..... 521
Chicago Edison Co. *v.* Moren, 185 Ill. 571..... 349
Chicago General Ry. Co. *v.* Murray, 174 Ill. 259..... 380
Chicago League Ball Club *v.* City of Chicago, 77 Ill. App. 124.. 58
Chicago and N. W. Ry. Co. *v.* City of Chicago, 140 Ill. 309..503, 502
Chicago and N. W. Ry. Co. *v.* Hansen, 166 Ill. 623..... 483
Chicago, R. I. and P. Ry. Co. *v.* Eininger, 114 Ill. 79....427, 426, 423
Chicago, St. Louis and Pittsburg R. R. Co. *v.* Welsh, 118 Ill. 572. 423
Chicago and Western Indiana R. R. Co. *v.* Ayres, 106 Ill. 511.... 505
Chicago and Western Indiana R. R. Co. *v.* Dunbar, 95 Ill. 571... 267
Chicago West Division Ry. Co. *v.* Ryan, 131 Ill. 474..... 423
Choteau *v.* Jones, 11 Ill. 300..... 357
Christie St. Commission Co. *v.* Board of Trade, 94 Ill. App. 229. 407
Cicero and Proviso Street Ry. Co. *v.* City of Chicago, 176 Ill. 501. 496
Cin., Ham. and Day. R. R. Co. *v.* Bowling Green, 49 N. E. Rep. 121. 631
Clapp *v.* Peterson, 104 Ill. 26.....242, 241
Clark *v.* People, 15 Ill. 213.....319
Clark *v.* Rosenbraus, 31 N. J. Eq. 667..... 31
Coal Run Coal Co. *v.* Finlen, 124 Ill. 666..... 337
Coke *v.* Gutkese, 80 Ky. 598..... 572
Colcord *v.* Alexander, 67 Ill. 581.....553, 357
Coleman *v.* Howe, 154 Ill. 458..... 242
Commercial Nat. Bank *v.* Burch, 141 Ill. 519..... 241
Commissioners of Drainage District *v.* Griffin, 134 Ill. 330..326, 323
Commissioners of Highways *v.* Harper, 38 Ill. 103..... 322

PAGE.
Commissioners of Highways *v.* Supervisors, 27 Ill. 140..... 323
Consolidated Coal Co. *v.* Scheiber, 167 Ill. 539..... 469
Consolidated Coal Co. *v.* Wombacher, 134 Ill. 57..... 561
Consolidated Ice Machine Co. *v.* Keifer, 123 Ill. 481..... 562
Cooper *v.* Ash, 76 Ill. 11..... 344
Cooper *v.* Hamilton Building and Loan Ass. 97 Tenn. 285..... 565
Coughlin *v.* Barker, 46 Mo. App. 54..... 637
Cowen *v.* Sunderland, 145 Mass. 363..... 571
Cox *v.* Brackett, 41 Ill. 222..... 469
Craig *v.* People, 193 Ill. 199..... 192
Crawford *v.* Mail and Express Pub. Co. 57 N. E. Rep. 616..... 225

D

Dalby *v.* Campbell, 26 Ill. App. 502..... 453
Daniel *v.* Moore, 51 Mo. 589..... 564
Darst *v.* Gale, 83 Ill. 136 565
Davis *v.* Beasley, 75 Va. 491..... 563
Davis *v.* Dale, 150 Ill. 239..... 256
Davis *v.* Easty, 8 Pick. 475..... 188
Davis Paint Co. *v.* Metzger Oil Co. 188 Ill. 295.....197, 196
Dawes *v.* Head, 3 Pick. 128 .....188, 185
Decker *v.* Decker, 121 Ill. 341..... 234, 233
Delahay *v.* Clement, 2 Scam. 575..... 262
Dement *v.* Rokker, 126 Ill. 174..... 264
Dexter *v.* Tree, 117 Ill. 532..... 229
Dicken *v.* Liverpool Salt and Coal Co. 41 W. Va. 518..... 425
Dillman *v.* Nadelhoffer, 162 Ill. 625.....36, 32
Dishon *v.* Schorr, 19 Ill. 59..... 511
Doggett *v.* Dill, 108 Ill. 560 141
Drainage Comrs. *v.* Illinois Central R. R. Co. 158 Ill. 353..... 300
Drainage Comrs. *v.* Volke, 163 Ill. 243..... 323
Drake *v.* Phillips, 40 Ill. 388..... 82
Drummond Tobacco Co. *v.* Randle, 114 Ill. 412..... 267
Drury *v.* Connell, 177 Ill. 43..... 486
Ducker *v.* Wear & Boogher Dry Goods Co. 145 Ill. 653..... 245

E

Eckhart *v.* Irons, 128 Ill. 568.....636, 578
Eggleston *v.* Royal Trust Co. 192 Ill. 101..... 611
Ellison *v.* Hammond, 189 Ill. 470..... 163
Elmore *v.* Drainage Comrs. 135 Ill. 269 327
Elston *v.* City of Chicago, 40 Ill. 514..... 546
Elzas *v.* Elzas, 171 Ill. 632 444
Ennis *v.* Pullman Palace Car Co. 165 Ill. 161..... 602
Erie Passenger Ry. Co. *v.* Schuster, 113 Pa. St. 415..... 425
Evans *v.* Fisher, 5 Gilm. 453 375
Evans *v.* Lewis, 121 Ill. 478..... 326
Ewertsen *v.* Gerstenberg, 186 Ill. 344.....636, 579

F

PAGE.
Falls *v.* City of Cairo, 58 Ill. 403.....547, 546
Fanning *v.* Russell, 94 Ill. 386..... 140
Farwell *v.* Great Western Tel. Co. 161 Ill. 522..... 257
Farwell *v.* Harding, 96 Ill. 32..... 196
Featherstone *v.* People, 194 Ill. 325..... 177
Field *v.* City of DesMoines, 39 Iowa, 575..... 506
Field *v.* Crawford, 146 Ill. 136..... 450
First Nat. Bank of Peoria *v.* Commercial Nat. Bank, 151 Ill. 308. 186
First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296..... 450
First Nat. Bank of Mt. Vernon *v.* Sarlls, 129 Ind. 201..... 503
Fletcher *v.* Wall, 172 Ill. 427.....106, 104
Fortune *v.* Stockton, 182 Ill. 454..... 117
Fowler *v.* People, 93 Ill. 116..... 359
Frank *v.* King, 121 Ill. 250..... 31
Frazer *v.* City of Chicago, 186 Ill. 480..... 506
Frazer *v.* Supervisors of Peoria County, 74 Ill. 282..... 50
Frye *v.* Partridge, 82 Ill. 267..... 635
Furness *v.* Union Nat. Bank, 147 Ill. 570..... 186

G

Gage *v.* Busse, 94 Ill. 590..... 395
Gage *v.* City of Chicago, 192 Ill. 586..... 516
Gage *v.* City of Chicago, 193 Ill. 108..... 516
Gage *v.* City of Chicago, 195 Ill. 490..... 517
Gage *v.* People, 193 Ill. 316..... 604
Gage *v.* Schmidt, 104 Ill. 106..... 38
Gage *v.* Thompson, 161 Ill. 403..... 196
Gage *v.* Wheeler, 129 Ill. 197..... 561
Gaines *v.* Williams, 146 Ill. 450..... 170
Galbraith *v.* Plasters, 101 Ill. 444..... 395
Gavin *v.* City of Chicago, 97 Ill. 66..... 422
Gay *v.* Gay, 123 Ill. 221..... 28
Gehrke *v.* Gehrke, 190 Ill. 166..... 561
Gerke *v.* Fancher, 158 Ill. 375..... 469
Gibbons *v.* Vanderhoogt, 75 Ill. App. 106..... 533
Gilbert *v.* Peteler, 38 Barb. 488..... 638
Givins *v.* City of Chicago, 188 Ill. 348..... 392
Gizler *v.* Witzel, 82 Ill. 322..... 287
Glos *v.* Beckman, 168 Ill. 74..... 196
Glos *v.* Kemp, 192 Ill. 73..... 196
Glover *v.* Condell, 163 Ill. 566..... 233
Goodrich *v.* VanNortwick, 43 Ill. 445..... 225
Goodwillie *v.* City of Lake View, 137 Ill. 51..... 494
Gorrell *v.* Payson, 170 Ill. 213..... 531
Graver Tank Works *v.* O'Donnell, 191 Ill. 236.....349, 347
Green *v.* Goff, 153 Ill. 534..... 89
Greenwood *v.* Town of LaSalle, 137 Ill. 225..... 359

PAGE.
Gregsten *v.* City of Chicago, 145 Ill. 451 587
Griffin *v.* Goldsboro Water Co. 30 S. E. Rep. 319 631
Griffith *v.* Ventres, 91 Ala. 366 563
Grosbeck *v.* Seeley, 13 Mich. 329 563
Gundlach *v.* Schott, 192 Ill. 509 386
Gunn *v.* Ohio River R. R. Co. 42 W. Va. 676 425

H

Hagan *v.* Varney, 147 Ill. 281 82
Hake *v.* Strubel, 121 Ill. 321 374
Hammers *v.* Dole, 61 Ill. 307 ..... 566, 564
Hammond *v.* People, 164 Ill. 455 94
Harrison *v.* Weatherby, 180 Ill. 418 50
Harts *v.* Wendell, 26 Ill. App. 274 453
Hawes *v.* City of Chicago, 158 Ill. 653 593
Hayes *v.* Massachusetts Mutual Life Ins. Co. 125 Ill. 626 115
Hays *v.* Southern Building and Loan Ass. 124 Ala. 663 ..... 565, 563
Hayward *v.* Burke, 151 Ill. 121 144
Hayward *v.* People, 145 Ill. 55 344
Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co. 137 Ill. 231 .. 267
Healy *v.* People, 163 Ill. 372 171
Hefling *v.* VanZandt, 162 Ill. 162 280
Henderson *v.* Hatterman, 146 Ill. 555 579
Hibbard *v.* City of Chicago, 173 Ill. 91 587
Hide and Leather Bank *v.* Alexander, 184 Ill. 416 98
Hileman *v.* Beale, 115 Ill. 355 ..... 163, 94
Hinsdale, Village of, *v.* Shannon, 182 Ill. 312 375
Hoboken Savings Bank *v.* Becham, 33 N. J. Eq. 53 37
Hockett *v.* Bailey, 86 Ill. 74 ..... 36, 34, 33, 32, 28
Hodge *v.* People, 96 Ill. 423 294
Hodges *v.* Percival, 132 Ill. 53 290
Hoge *v.* People, 117 Ill. 35 531
Hohmann *v.* City of Chicago, 140 Ill. 226 509
Holden *v.* City of Chicago, 172 Ill. 263 153
Horbach *v.* Tyrrell, 67 N. W. Rep. 485 ..... 569, 563
Horner *v.* Boyden, 27 Ill. App. 573 453
How *v.* Camp, Walk. 427 37
Howe *v.* Medaris, 183 Ill. 288 290
Howe *v.* South Park Comrs. 119 Ill. 101 94
Hubble *v.* Wright, 23 Ind. 323 564
Hudson *v.* People, 188 Ill. 103 610
Hughes *v.* Noyes, 171 Ill. 575 ..... 33, 31
Hughes *v.* Trahern, 64 Ill. 48 118
Hunt *v.* Hort, 3 Brown's Ch. 312 235
Hutchinson *v.* Howe, 100 Ill. 11 395
Hutchinson *v.* Ulrich, 145 Ill. 336 636
Hyde Park, Village of, *v.* Corwith, 122 Ill. 441 494

I

PAGE.

Ide *v.* Fratcher, 194 Ill. 552 201
Illinois Central R. R. Co. *v.* Aland, 192 Ill. 37 285
Illinois Central R. R. Co. *v.* Cox, 21 Ill. 20 621
Illinois Central R. R. Co. *v.* McLean County, 17 Ill. 291..342, 340, 337
Illinois Central R. R. Co. *v.* People, 143 Ill. 434 552
Illinois Central R. R. Co. *v.* Simmons, 38 Ill. 242 469
Illinois Central R. R. Co. *v.* Slater, 129 Ill. 91 531
Illinois Linen Co. *v.* Hough, 91 Ill. 63 531
Illinois Steel Co. *v.* Schymanowski, 162 Ill. 447 .....387, 385, 350
Indiana and Illinois Southern Ry. Co. *v.* Wilson, 77 Ill. App. 603. 511
Indiana, Illinois and Iowa R. R. Co. *v.* Stauber, 185 Ill. 9 379
Insurance Co. *v.* Eldridge, 102 U. S. 545 479
Iron Belt Building and Loan Ass. *v.* Groves, 96 Va. 138.....565, 563
Iroquois Furnace Co. *v.* Wilkin Manf. Co. 181 Ill. 582 368
Irvin *v.* New Orleans, St. Louis and Chicago R. R. Co. 94 Ill. 105. 625
Iseninger *v.* Criswell, 67 N. W. Rep. 290 31
Iseninger *v.* Criswell, 98 Iowa, 383 36

J

Jackson *v.* Kraft, 186 Ill. 623 33
Jackson *v.* Sackett, 146 Ill. 646 197
Johnson *v.* Johnson, 187 Ill. 86 .....172, 171
Joliet, City of, *v.* Blower, 155 Ill. 414 505
Jones *v.* Porter, 59 Miss. 628 563

K

Keady *v.* White, 168 Ill. 76 .....36, 28
Keating *v.* People, 160 Ill. 480 213
Keegan *v.* Kinnare, 123 Ill. 280 521
Keigwin *v.* Drainage Comrs. 115 Ill. 347 326
Kerfoot *v.* City of Chicago, 195 Ill. 229 .....517, 394
Kern *v.* Myll, 80 Mich. 525 573
Kerr *v.* Forgue, 54 Ill. 482 423
Kidder *v.* Douglas, 194 Ill. 388 95
Kiernan *v.* Chicago, Santa Fe and California Ry. Co. 123 Ill. 188. 380
Kinnah *v.* Kinnah, 184 Ill. 284 125
Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206 637
Kohlhof *v.* City of Chicago, 192 Ill. 249 217
Kornazsewska *v.* West Chicago Street R. R. Co. 76 Ill. App. 366. 172
Kothe *v.* Krag-Reynolds Co. 50 N. E. Rep. 594 564
Kratz *v.* Kratz, 189 Ill. 276 87
Kronenberger *v.* Heinemann, 190 Ill. 17 395
Kurtz *v.* Hibner, 55 Ill. 514 .....235, 234, 233
Kyle *v.* Town of Logan, 87 Ill. 64 229

L

Lachman *v.* Martin, 139 Ill. 450 248
Lake Street Elevated R. R. Co. *v.* City of Chicago, 183 Ill. 75... 496
Lake View, City of, *v.* Tate, 130 Ill. 247 593

PAGE.
Lamping Bros. *v.* Payne, 83 Ill. 463. 319
LaSalle, City of, *v.* Kostka, 190 Ill. 130.....386, 352, 350, 349
LaSalle, County of, *v.* Milligan, 143 Ill. 321..... 307
Lasher *v.* People, 183 Ill. 226 464
Laurence *v.* Laurence, 164 Ill. 367..... 444
Law *v.* People, 80 Ill. 268.....553, 358
Lebanon Coal and Machine Ass. *v.* Zerwick, 77 Ill. App. 486.... 511
Lees *v.* Drainage Comrs. 125 Ill. 47.....326, 323
Lehndorf *v.* Cope, 122 Ill. 317..... 44
Leonard *v.* Crane, 147 Ill. 52..... 561
Levy *v.* Chicago Nat. Bank, 158 Ill. 88..... 186
Lickmon *v.* Harding, 65 Ill. 505..... 567
Ligare *v.* City of Chicago, 139 Ill. 46..... 394
Linton *v.* Quimby, 57 Ill. 271..... 82
Litch *v.* Clinch, 136 Ill. 410 197
Llewellin *v.* Dingee, 165 Ill. 26..... 197
Loehr *v.* People, 132 Ill. 504 171
Long *v.* Crews, 113 N. C. 256..... 563
Lowentrout *v.* Campbell, 130 Ill. 503..... 36
Lynch *v.* Livingston, 6 N. Y. 422..... 565
Lynn *v.* Lynn, 135 Ill. 18..... 80
Lyons, Town of, *v.* Cook, 9 Ill. App. 543 546

M

Mackey *v.* City of Vicksburg, 64 Miss. 779..... 424
Madison *v.* Larmon, 170 Ill. 65..... 50
Mahony *v.* Davis, 44 Ill. 288..... 377
Maple Valley, Township of, *v.* Foley, 113 Mich. 622..... ... 36
Marmon *v.* Harwood, 124 Ill. 104..... 28
Marston *v.* Brittenham, 76 Ill. 611..... 568
Mason *v.* Tiffany, 45 Ill. 392..... 141
Maxwell *v.* McAtee, 9 B. Mon. 20..... 90
McChesney *v.* City of Chicago, 173 Ill. 75..... 515
McChesney *v.* People, 174 Ill. 46..... 606
McGinnis *v.* Fernandes, 126 Ill. 228..... ... 297
McNamara *v.* Seaton, 82 Ill. 498..... 308
McPhail *v.* People, 160 Ill. 77..... 328
McPherson *v.* Sanborn, 88 Ill. 150..... 568
Merced Bank *v.* Rosenthal, 99 Cal. 39.....565, 563
Metheny *v.* Bohn, 160 Ill. 263..... 81
Metropolitan West Side El. R. R. Co. *v.* Skola, 183 Ill. 454..... 349
Metropolitan West Side El. R. R. Co. *v.* Stickney, 150 Ill. 362.... 525
Metropolitan West Side El. R. R. Co. *v.* White, 166 Ill. 375...510, 170
Mettler *v.* Miller, 129 Ill. 630..... 53
Miles *v.* Kelly, 40 S.W. Rep. 599.....565, 563
Miller *v.* Balthasser, 78 Ill. 302..... 287
Miller *v.* Cinnamon, 168 Ill. 447..... 602
Miller *v.* People, 39 Ill. 457..... 171

PAGE.
Minnesota *v.* Barber, 136 U. S. 313..... 504
Minor *v.* Austin, 45 Iowa, 221..... 188
Monroe *v.* Poorman, 62 Ill. 523..... 568
Monson *v.* Kill, 144 Ill. 248..... 38
Moore *v.* Parker, 53 L. R. A. 778..... 572
Moritz *v.* Hoffman, 35 Ill. 553..... 28
Morrill *v.* Kilner, 113 Ill. 318.....38, 34, 28
Morris, etc. R. R. Co. *v.* Blair, 9 N. J. Eq. 635 37
Morrison *v.* Kelly, 22 Ill. 610..... 610
Morse *v.* Smith, 83 Ill. 396..... 94
Murphy *v.* City of Peoria, 119 Ill. 509..... 218

N

National Bank *v.* Conway, 17 Fed. Cas. 1202..... 565
Nelson *v.* Smith, 64 Ill. 394..... 36
New England Fire and Marine Ins. Co. *v.* Wetmore, 32 Ill. 221.. 511
Newkirk *v.* Cone, 18 Ill. 449..... 511
Newman *v.* City of Chicago, 153 Ill. 469.....495, 492
New York and Chic. Grain Exch. *v.* Board of Trade, 127 Ill. 153. 409
New York and New England R. R. Co. *v.* Bristol, 151 U. S. 556.. 502
North Chicago Street R. R. Co. *v.* Baur, 179 Ill. 126..... 533
North Chicago Street R. R. Co. *v.* Dudgeon, 184 Ill. 477..... 201
North Chicago Street R. R. Co. *v.* Shreve, 171 Ill. 438..... 172
North Chicago Street R. R. Co. *v.* Southwick, 165 Ill. 494..... 172
Norton *v.* Colby, 52 Ill. 198..... 602
Noyes *v.* Smith & Lee, 28 Vt. 64..... 352

O

Ochs *v.* People, 124 Ill. 399..... 172
O'Connor *v.* Wilson, 57 Ill. 226..... 566
Odin Coal Co. *v.* Denman, 185 Ill. 413..... 161
O'Donnell *v.* Colby, 153 Ill. 324..... 453
Offutt *v.* World's Columbian Exposition, 175 Ill. 472..... 349
O'Hare *v.* Chicago, Madison and Northern R. R. Co. 139 Ill. 151. 377
Ohio and Mississippi Ry. Co. *v.* People, 123 Ill. 648..... 609
O'Leary *v.* Cook County, 28 Ill. 534..... 461
Order of Foresters *v.* Schweitzer, 171 Ill. 325..... 450
Osborn *v.* People, 103 Ill. 224..... 326
Osgood *v.* Groseclose, 159 Ill. 511..... 167
Owensboro Gaslight Co. *v.* Hildebrand, 42 S. W. Rep. 351 632

P

Pagels *v.* Meyer, 193 Ill. 172 620
Palmer *v.* Harris, 98 Ill. 507..... 280
Pardridge *v.* Village of Hyde Park, 131 Ill. 537..... 493
Parker *v.* Orr, 158 Ill. 609..... 105
Patterson *v.* McKinney, 97 Ill. 41..... 28
Pawnee Coal Co. *v.* Royce, 184 Ill. 402..... 161

PAGE.
Payson *v.* People, 175 Ill. 267.....327, 322
Peck *v.* Boggess, 1 Scam. 281..... 319
Peirce *v.* Walters, 164 Ill. 560..... 259
Pells *v.* People, 159 Ill. 580.....606, 605
Pennsylvania Co. *v.* Stoelke, 104 Ill. 201..... 511
People *v.* Barger, 62 Ill. 452..... 338
People *v.* Blue Mountain Joe, 129 Ill. 370.....462, 461
People *v.* Brown, 67 Ill. 435..... 328
People *v.* Budd, 117 N. Y. 1..... 503
People *v.* Chicago and Alton R. R. Co. 96 Ill. 369..... 355
People *v.* City of Peoria, 166 Ill. 517..... 323
People *v.* City of Spring Valley, 129 Ill. 169..... 267
People *v.* Clifford, 166 Ill. 165..... 355
People *v.* Cooper, 139 Ill. 461.....323, 322, 267
People *v.* Dragstran, 100 Ill. 286..... 355
People *v.* Drainage Comrs. 165 Ill. 156..... 324
People *v.* Eggers, 164 Ill. 515..... 355
People *v.* Gary, 105 Ill. 264..... 375
People *v.* Kipley, 171 Ill. 44.....464, 463
People *v.* Lippincott, 65 Ill. 548.....340, 339
People *v.* Loeffler, 175 Ill. 585..... 464
People *v.* Miner, 46 Ill. 374..... 546
People *v.* Miner, 46 Ill. 384..... 339
People *v.* Morgan, 90 Ill. 558..... 463
People *v.* O'Hair, 128 Ill. 20..... 267
People *v.* Reat, 107 Ill. 581.....356, 354
People *v.* Stahl, 101 Ill. 346..... 359
People *v.* Whidden, 191 Ill. 374.....605, 604
People *v.* Village of Hyde Park, 117 Ill. 462..... 494
People's Loan Ass. *v.* Keith, 153 Ill. 609..... 343
Phelps *v.* Curts, 80 Ill. 109..... 28
Phenix Ins. Co. *v.* LaPointe, 118 Ill. 384..... 170
Phillips *v.* Kesterson, 154 Ill. 572.....37, 32
Pope *v.* Dodson, 58 Ill. 360..... 172
Poppers *v.* Meagher, 148 Ill. 192..... 368
Port *v.* Port, 70 Ill. 484..... 444
Porter *v.* Goble & Co. 88 Iowa, 565..... 36
Porter *v.* Rockford, Rock Island and St. L. R. R. Co. 76 Ill. 561.. 337
Potwin *v.* Johnson, 108 Ill. 70..... 461
Preston *v.* City of Boston, 12 Pick. 15..... 546
Price *v.* Blackmore, 65 Ill. 386..... 82
Primmer *v.* Clabaugh, 78 Ill. 94..... 248
Pullman Palace Car Co. *v.* Bluhm, 109 Ill. 20..... 471
Pullman Palace Car Co. *v.* Laack, 143 Ill. 242..... 385
Pumpelly *v.* Green Bay Co. 13 Wall. 166..... 503

Q

Quinn *v.* Donovan, 85 Ill. 194..... 531

R

PAGE.
Rack v. Chicago City Ry. Co. 173 Ill. 289.....417, 416
Railroad Co. v. Commissioners, 79 Me. 386..... 503
Railroad Co. v. Commissioners, 8 Otto, 541..... 546
Railway Conductors' Benefit Ass. v. Leonard, 166 Ill. 154..... 170
Ramsey v. Hoeger, 76 Ill. 432..... 339
Reading v. Traver, 83 Ill. 372..... 275
Reed v. Reed, 135 Ill. 482.....36, 33
Renwick v. Hall, 84 Ill. 162..... 326
Richards v. Matson, 51 Ill. App. 530..... 448
Rider v. People, 110 Ill. 11..... 178
Rigney v. City of Chicago, 102 Ill. 64.....522, 506, 505
Roane v. Baker, 120 Ill. 308 569
Roberts v. Quest, 173 Ill. 427.....106, 104
Roberts v. Spokane Street Ry. Co. 54 L. R. A. 190..... 416
Robinson v. Brems, 90 Ill. 351..... 248
Robinson v. Ruprecht, 191 Ill. 424..... 444
Rock Island and Peoria Ry. Co. v. Leisy Brewing Co. 174 Ill. 547. 287
Rohn v. Harris, 31 Ill. App. 26..... 268
Rohn v. Harris, 130 Ill. 525..... 267
Ronans v. Maddow, 77 Iowa, 206.....36, 31
Roy v. Goings, 112 Ill. 656..... 171
Russell v. Baptist Theological Union, 73 Ill. 337..... 567

S

San Antonio Street Ry. Co. v. Mechler, 87 Tex. 628..... 416
Sands v. Wacaser, 149 Ill. 530..... 377
Sanford v. Finkle, 112 Ill. 146..... 80
Sanner v. Patton, 155 Ill. 553..... 105
Sayre v. Fredericks, 16 N. J. Eq. 205..... 37
Schmidt v. Pfau, 114 Ill. 494..... 602
School Directors v. People, 79 Ill. 511..... 318
Schwarz v. Schwarz, 26 Ill. 81 511
Schweer v. Schwabacher, 17 Ill. App. 78..... 453
Scofield v. Tompkins, 95 Ill. 190..... 368
Searing v. Heavysides, 106 Ill. 85..... 625
Short v. Devine, 146 Mass. 119..... 90
Siegel v. Hanchett, 33 Ill. App. 634..... 453
Smith v. Bell, 6 Pet. 72..... 87
Smith v. Clarke, 69 N. W. Rep. 1011 .....565, 563
Smith v. Willard, 174 Ill. 538.....36, 34, 32
Smith v. Young, 160 Ill. 163..... 579
Snowball v. People, 147 Ill. 260..... 316
Snydacker v. Brosse, 51 Ill. 357..... 566
Snyder v. Gordon, 46 Hun, 538..... 573
Soby v. People, 134 Ill. 66.....406, 403
Star Brewery Co. v. Primas, 163 Ill. 652..... 638
State v. Moore, 104 N. C. 714..... 503

PAGE.
Steadman *v.* Wilbur, 7 R. I. 481 31
Stephens *v.* People, 89 Ill. 337 ..... 317, 316
Sterling Gas Co. *v.* Higby, 134 Ill. 557 337
Stevens *v.* Hadfield, 178 Ill. 532 ..... 256, 255, 254
Stevens *v.* Wait, 112 Ill. 544 357
Stevison *v.* Earnest, 80 Ill. 513 453
Stiger *v.* Bent, 111 Ill. 328 ..... 479, 117
St. Louis Loan and Invest. Co. of E. St. Louis, *In re*, 194 Ill. 609. 389
St. Louis and Sandoval Coal Co. *v.* Edwards, 103 Ill. 472 267
Stover *v.* Mitchell, 45 Ill. 213 547
Summers *v.* Brewing Co. 143 Ill. 115 425
Summers *v.* Smith, 127 Ill. 645 44
Swanston *v.* Ijams, 63 Ill. 165 ..... 547, 546
Swift & Co. *v.* Madden, 165 Ill. 41 285
Swift & Co. *v.* O'Neill, 187 Ill. 337 349

T

Taylor *v.* Wright, 121 Ill. 455 357
Tedrick *v.* Wells, 152 Ill. 214 163
Terhune *v.* Matson, 40 Ill. App. 296 451
Tinker *v.* Forbes, 136 Ill. 221 638
Toledo, Wabash and Western Ry. Co. *v.* Grable, 88 Ill. 441 423
Toledo, Wabash and Western Ry. Co. *v.* Jacksonville, 67 Ill. 37. 593
Tomlinson *v.* Matthews, 98 Ill. 178 34
Town *v.* Howieson, 175 Ill. 85 163
Travener *v.* Barrett, 21 W. Va. 681 563
Tugman *v.* City of Chicago, 78 Ill. 405 593
Tuschinski *v.* Metropolitan West Side El. R. R. Co. 176 Ill. 420 .. 567

U

Union Bridge Co. *v.* Teehan, 190 Ill. 374 412
Union Building Ass. *v.* City of Chicago, 61 Ill. 439 546
Union Mutual Life Ins. Co. *v.* Campbell, 95 Ill. 267 ..... 79, 76
Upton *v.* People, 176 Ill. 632 356

V

Vallette *v.* Bilinski, 167 Ill. 564 ..... 387, 202
Vance *v.* Rankin, 194 Ill. 625 277
Vandersyde *v.* People, 195 Ill. 200 147

W

Wabash, St. Louis and Pacific Ry. Co. *v.* Rector, 104 Ill. 296 531
Wabash, St. Louis and Pacific Ry. Co. *v.* Shacklet, 105 Ill. 364 ... 531
Wachter *v.* Albee, 80 Ill. 47 602
Walbridge *v.* Railway Co. 190 Pa. St. 274 424
Wallace *v.* Railway Co. 26 Ore. 174 426
Walser *v.* Board of Education, 160 Ill. 272 ..... 610, 546
Washington Fire Ins. Co. *v.* Kelly, 32 Md. 421 87

PAGE.
Wasson *v.* Conner, 54 Miss. 351 563
Watson Cut Stone Co. *v.* Small, 181 Ill. 366 385
Weber *v.* Christen, 121 Ill. 91 77
Weick *v.* Lander, 75 Ill. 93 531
Wells *v.* Bourdages, 193 Ill. 328 386
West Chicago Street R. R. Co. *v.* City of Chicago, 178 Ill. 339 .. 496
West Chicago Street R. R. Co. *v.* Estep, 162 Ill. 130 430
West Chicago Street R. R. Co. *v.* Fishman, 169 Ill. 196 259
West Chicago Street R. R. Co. *v.* Krueger, 168 Ill. 586 170
West Chicago Street R. R. Co. *v.* Levy, 182 Ill. 525 470
West Chicago Street R. R. Co. *v.* McCallum, 169 Ill. 240 ....414, 302
West Chicago Street R. R. Co. *v.* Nash, 166 Ill. 528 430
Wetherell *v.* Devine, 116 Ill. 631 .....342, 340
Wetherell *v.* O'Brien, 140 Ill. 146 39
Whaley *v.* Jarrett, 69 Wis. 613 90
Whittaker *v.* Village of Venice, 150 Ill. 195 323
Wilkinson *v.* Gage, 133 Ill. 137 395
Williams *v.* Jackson, 107 Ill. 478 479
Williams *v.* VanCleve, 7 T. B. Mon. 393 87
Williams *v.* Williams, 189 Ill. 500 .....235, 234, 233
Wills *v.* Wood, 28 Kan. 400 564
Wilson *v.* Augur, 176 Ill. 561 197
Wilson *v.* Traer, 20 Iowa, 231 563
Witt *v.* Gardiner, 158 Ill. 176 486
Wood *v.* Comrs. of Highways, 62 Ill. 391 322
Wortman *v.* Price, 47 Ill. 22 33

Y

Young *v.* Wittenmyre, 123 Ill. 303 187

Z

Zirngibl *v.* Calumet Dock Co. 157 Ill. 430 227